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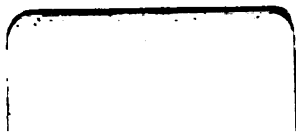
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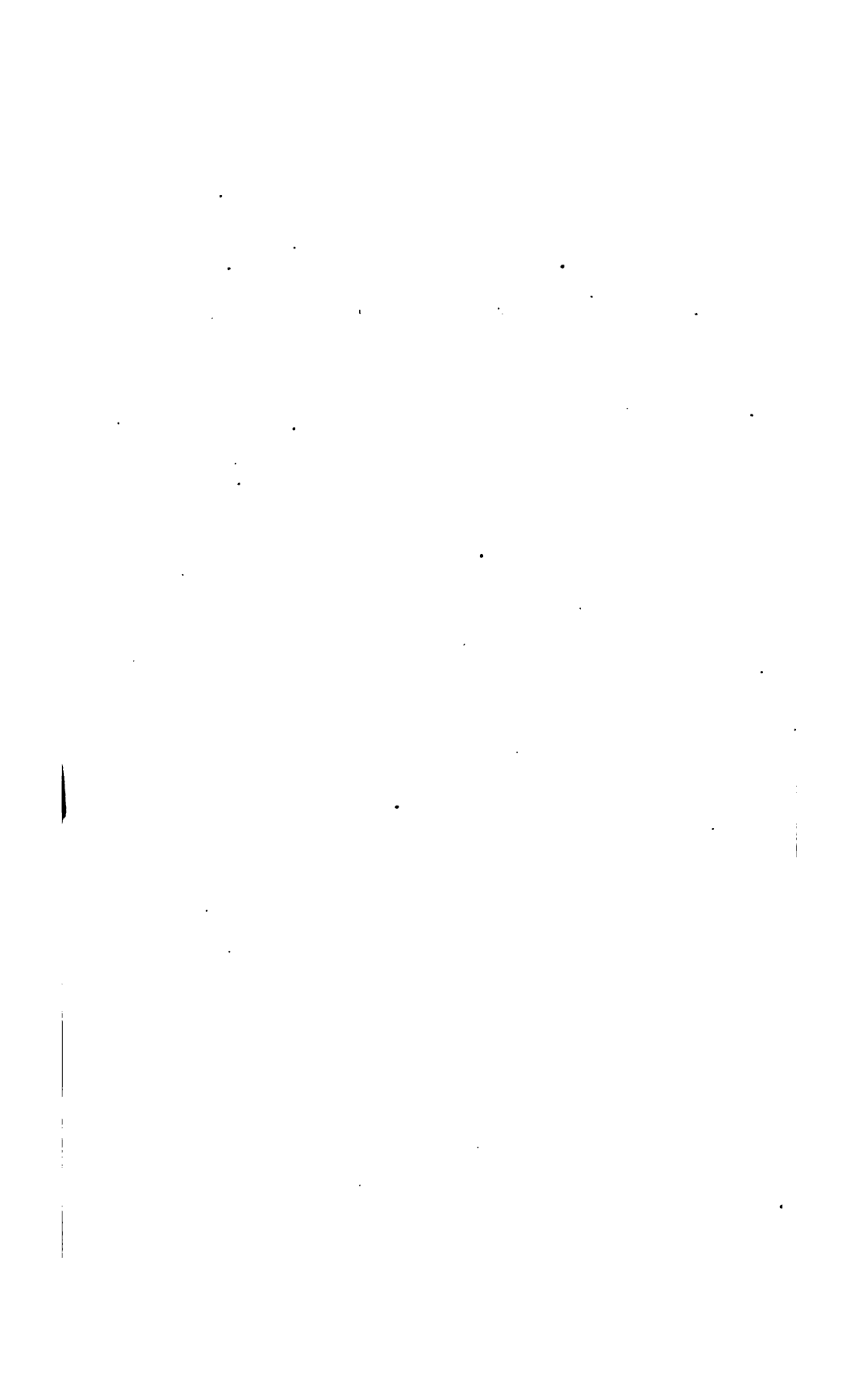
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

REPORTED BY
WILLIAM B. WOODS,
THE CIRCUIT JUDGE.

VOL. II.

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JUDGES
OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

HON. JOSEPH P. BRADLEY, CIRCUIT JUSTICE,
HON. WILLIAM B. WOODS, CIRCUIT JUDGE.

DISTRICT JUDGES:

HON. JOHN ERSKINE,
DISTRICT OF GEORGIA.

HON. JAMES W. LOCKE,
SOUTHERN DISTRICT OF FLORIDA.

HON. JOHN BRUCE,
DISTRICT OF ALABAMA.

HON. ROBERT A. HILL,
DISTRICT OF MISSISSIPPI.

HON. EDWARD COKE BILLINGS,
DISTRICT OF LOUISIANA.

HON. AMOS MORRILL,
EASTERN DISTRICT OF TEXAS.

HON. THOMAS H. DUVAL,
WESTERN DISTRICT OF TEXAS.

NOTE.—The office of United States District Judge for the Northern District of Florida became vacant on July 24, 1876, on the death of Hon. PHILIP FRASER.



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Y.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
FIFTH JUDICIAL CIRCUIT.

DISTRICT OF LOUISIANA.

AT CHAMBERS, NOVEMBER, 1873.

PARSONS et al. vs. HOWARD et al.

1. In a suit in equity for a demand due to a partnership, all the partners must be joined either as complainants or defendants. They are not merely proper but necessary parties.
2. The United States courts have no power to effect a constructive service of process on nonresidents. If nonresidents are necessary parties, unless they voluntarily appear, the suit cannot be maintained in the federal courts. If they do appear as defendants and are citizens of the same state with the complainants, the court is ousted of jurisdiction.
3. *Seem*, that a suit against partners may be brought in a federal court although some of them may not be found within the jurisdiction of the court.

NOTE. By a late statute absent defendants may be cited by an order of publication when the suit is brought to enforce a legal or equitable claim or lien on real or personal property within the district. See act of June 1, 1872, Rev. Stat., sec. 738.

Parsons vs. Howard.

IN EQUITY.

The bill in this case stated in substance that the complainants, together with some of the defendants and certain other persons, whose names appeared in the bill, and who were citizens of the same state (New York) with the complainants, were associated together in the lottery business, being proprietors of several lottery grants from various states; and that to facilitate the business and avoid conflict of interest, they had put the entire business into the hands of certain trustees (including two of the defendants), and that it was carried on in various states by these trustees under the name of C. H. Murray & Co., the several associates being interested in certain shares and proportions. Among the terms of the engagement and trust, under which the business was conducted, was one, that if any of the associates should at any time acquire any other lottery grants or privileges, the same should be transferred to the trustees as part of the common stock. Monthly settlements and dividends of profits were to be made. Howard, one of the defendants, was agent of the concern in New Orleans. The bill complained that he and other defendants, and also some of the associates not made defendants, on account of their residence as above stated, procured a charter from the state of Louisiana, conferring the exclusive right to draw lotteries; and then took a contract from that corporation to carry on the business and perform its obligations to the state; and that they excluded the complainants and other associates in the original combination from all participation in the profits of this business. The bill prayed that the defendants might be declared trustees for the original concern, and might account for all profits made, and for a sale of the business, division of proceeds, and a temporary injunction. Among the allegations made, was one, that the defendants used the funds of C. H. Murray & Co., in establishing the separate business in Louisiana.

One of the complainants, Parsons, died, and certain persons claiming to be his representatives filed a bill of revivor. The defendants demurred to the original bill, and filed a plea to the bill of revivor. The other facts material to the understanding of the case will be found stated in the opinion.

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The case was argued by consent, on written briefs, before Mr. Circuit Justice BRADLEY.

Mr. James Emott, of New York, for complainants.

Messrs. E. C. Billings and *A. de B. Hughes*, for defendants.

BRADLEY, Circuit Justice. The plea to the bill of revivor in this case is good, if true, and if the suit proceeds farther, the complainants must reply to it, and proceed to proofs. I observe that the only allegation in the bill of revivor is, that the complainants therein have obtained letters of executorship on the estate of Reuben Parsons, deceased, without specifying any last will, any state or place, or court, in which the letters were issued. This is extremely informal. All these particulars should have been stated, so that the court could see that the complainants were fully entitled to be substituted in the place of Parsons. Letters testamentary, issued in New York, have no efficacy in Louisiana, unless the laws of the latter state make provision to that effect.

The demurrer to the original bill states as causes of objection, want of parties, multifariousness, immorality of the transactions on which the prayer for relief is founded, and general want of equity. The substantive charge of the bill is, that the defendants, together with Zachariah E. Simmons and John A. Morris, are carrying on a lucrative lottery business in New Orleans, and in the state of Louisiana, and appropriating the profits to their own use, whilst in equity the complainants and certain other persons are entitled to a share of said business, of which the defendants, together with Simmons and Morris, unjustly deprive them; and the relief sought is an account of the profits of the said business, a declaration that the defendants are trustees for the complainants, and the other parties really interested, and a sale of the whole property and business and division of the proceeds.

The ground on which this claim is based is, that Murray, one of the defendants, and Simmons and Morris, were formerly associated in the lottery business with the complainants and other persons, jointly as partners in a firm, whose style was generally C. H. Murray & Co., under an arrangement which commenced

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September 1, 1863, to last for ten years, by which the parties to the arrangement, having transferred all their interest in the lottery business, and grants to trustees (Simmons, Murray and Davis), for the purpose of being carried on by them for the mutual benefit of the proprietors, agreed to do the same with any other lottery grants, or interests therein, which they might severally acquire, under penalty of forfeiting the interest they already possessed in the joint business — the object of the assignments and trust being declared to be the avoiding of conflict of interest between the parties and the advantages of a consolidation and joint control of the whole business. The complainants were not originally parties to this arrangement; but in December, 1867, they became parties thereto, by the purchase, with others of certain of the shares, and in January, 1868, they became further interested by consolidating certain lottery interests of themselves and others with the said lottery business of the associates.

The whole concern then consisted of one hundred and fifteen shares, of which the complainants owned two and a half shares.

The defendant Howard was not an associate, but was the agent of the concern in New Orleans.

The gravamen of complaint is, that in the summer of 1868, whilst the business was thus carried on jointly, the defendants, Howard and Murray, with Zachariah E. Simmons, John A. Morris and other parties concerned and interested in the said business procured from the legislature of Louisiana an exclusive lottery grant in the shape of a legislative act under which a corporation, called the Louisiana State Lottery Company, was organized by them and a contract made with that corporation for carrying on the lottery business in Louisiana, and that the funds of the joint concern of C. H. Murray & Co. were used by them in procuring said grant, and establishing said business, and that by this contrivance they have monopolized the lottery business in that state and excluded the complainants and their other associates from all participation therein.

This is the business which the complainants claim as in equity belonging to the joint concern of C. H. Murray & Co., and for the proceeds of which they seek an account and settlement.

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The bill states that Morris, Simmons, Wm. F. Simmons, Wm. C. France, Benj. Wood and Henry Cotton are not made parties, because they are citizens of the same state with the complainants.

Conceding as I am inclined to do, that if the facts stated in the bill are true, the claim is well founded and free from the taint of immorality, and that there is no ground for the charge of multifariousness, a question of much gravity still remains in reference to the alleged want of proper parties.

I do not perceive any reason for making the Louisiana State Lottery company a party.

Nothing is demanded of it, and no charges of misconduct are made against it. It is no concern of the corporation that its stockholders are responsible to third parties for dividends and profits received. It has nothing to do with their controversies, unless in some way involved therein as a corporate body. Much less is the corporation concerned in the responsibility under which its contractors or agents may have brought themselves in reference to third parties.

As to Simmons and Morris, regarded as jointly guilty with the defendants, it is sufficient to say that a breach of trust or an act of bad faith, like a tort at common law, renders the parties, severally as well as jointly, liable as tortfeasors or breakers of trust; therefore they are not necessary parties.

There is more force in the objection that the other associates and copartners of the complainants, interested in the same manner as they, are not made parties. If this were the case of an ordinary bill for the settlement of partnership accounts, it is clear that all the partners would be necessary parties, because each has not only an interest in the general balance according to his share in the concern, but has an equitable lien for all advances made by him in its behalf, and is liable in equity as a partner for the advances made by the others; so that no settlement could be made without the actual or constructive presence of all. Hence all must be made parties; and if any of them are nonresidents, process must nevertheless be issued; and in the old English practice, certain forms had to be observed (terminating in the commission of rebellion) before the case could be heard. See Daniel's Ch. Pr., 1253.

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In this country, constructive service by publication is generally prescribed and allowed; but as it has been held that the federal courts have no means of effecting constructive service, such cases cannot be brought in them, unless the nonresident defendants voluntarily appear; and not even then, if they are citizens of the same state with the complainants. The present case, it is true, is not that of the settlement of a partnership concern. The bill seeks to make the defendants account for property in their hands, alleged to be partnership property, and make them trustees for the copartnership in respect thereof. The suit is brought, therefore, for the equal benefit of all the copartners who are not implicated in the transactions complained of. The fact that some of the defendants are copartners does not divest it of the character of a joint partnership demand. If the firm had held a mortgage on the lands of some of the partners for money lent, the complainants could as well have filed a bill to foreclose that mortgage, without making the other partners parties, as to file this bill. They do not even allege that they file it on behalf of themselves and the other partners, which, perhaps, they might do if the number were so great as to render it impracticable that all should be joined. It is simply the case of one or two partners suing alone for a partnership demand without joining the other partners. To this, the defendants have a right to object; for if these complainants can maintain this suit, the other partners similarly interested might maintain similar suits in other courts, for the recovery of the same demand. The excuse given, that to make the others parties would oust the court of jurisdiction, is not sufficient. That consequence cannot make it regular to proceed without them. That only proves that this court is not the proper tribunal to settle the controversy. If it be once settled that the other partners are not merely proper but necessary parties, the complainants cannot set up the limited jurisdiction of the court for not making them such.

If, like legatees and distributees of a deceased person's estate, they were entitled to an aliquot share of the moneys sought to be recovered, irrespective of the shares and accounts of their colleagues or cosuccessors; or, in the language of the common law,

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if they were tenants in common as contradistinguished from joint tenants, or if their titles were both joint and several, they might with more reason be entitled to sue alone for their aliquot share, although an accounting might be necessary to ascertain the amount due.

But the moneys sought to be recovered in this case are confessedly partnership moneys, and the complainants pray that they may be accounted for as such, and paid into the common partnership fund. In this state of things, it is evident that all the other partners are equally interested in the suit with the complainants themselves, and are virtually parties to it whether made such or not; and as no sufficient excuse is alleged for not joining therein, the bill is necessarily defective.

The case is essentially different from that of a suit brought *against* partners. In that case, as all are jointly liable *in solido*, or, according to the civil law, each is liable only for his virile share, a suit could probably be sustained against some of the partners, though the others could not be found within this jurisdiction.

The demurrer must be allowed, with costs.

NOVEMBER TERM, 1873.

E. K. CONVERSE et al. vs. JOHN W. CANNON et al.

1. It is no defense to an action for an infringement of a patent for a combination of several well known devices, for defendant to allege that he has improved upon one of the independent devices used in the combination.
2. Where a patent covers a combination of devices for handling steamboat staging, consisting of a rope attached to a derrick, and the application of force by means of a power windlass, the use of the combination without authority will be an infringement, notwithstanding variations in the method of attaching the rope, or in the form of the derrick, or in the position in which the stage is placed on the deck of the boat.

This was a cause in equity, heard for final decree upon the pleadings and evidence.

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Mr. J. R. Beckwith, for complainant.

Mr. R. H. Marr, for defendant.

Woods, Circuit Judge. The complainants allege that they are the assignees of a patent issued to one A. John Bell, dated January 22, 1861, for an "improvement in steamboat staging;" that they are also the assignees of two patents issued to one Hannibal S. Blood, the first dated June 7, 1870, being for "a new and useful improvement in derrick or hoisting crane, and relating particularly to a means for avoiding the labor and delay incident to handling and manipulating heavy landing stages used on steamboats and water craft by manual labor," and the second being a patent dated March 26, 1872, for an "improvement in derricks;" that all of the inventions named in said three letters patent relate to the manner and mode of manipulating and handling stages used on steamboats and water craft, for landing freight and passengers, whereby manual labor is in a great measure dispensed with, and great economy in the navigation of such vessels effected; that the defendants John W. Cannon and William Campbell, the first largely interested in the steamer Robert E. Lee, as owner, and the latter being her master, are using upon said boat two several machines which are substantially in their mode of construction the same as the machine described in said three letters patent.

The bill prays for a perpetual injunction against the defendants, to restrain them from infringing upon the patents owned by the complainants, by the use of said machine now employed by them upon the steamer Robert E. Lee.

The answer of defendants denies any infringement of the patents held by complainants, and claims that they use an apparatus invented by one John Perkins, and patented to him by letters dated May 7, 1872, which differs substantially and materially from the apparatus covered by the patents owned by complainants, and is not an infringement thereon.

The answer further alleges that the results attained by the contrivance patented to Blood were accomplished by cranes described upon pages 349, 350, vol. 1, of Appleton's Dictionary of Mechanics, published in 1865, one of which it is therein stated

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had been used at the United States dry dock, at Brooklyn, New York, and one in the construction of the Erie canal, by which heavy weights were moved toward or from the mast, and hoisted or lowered to the required position by means of ropes and pulleys.

That the results accomplished by the contrivance patented to Blood were accomplished during the late war by the marine brigade; by the application of steam power, heavy stages were raised, launched out and lowered into position on the bank, and again raised, launched inward and lowered into position in the boat, so that the results contemplated and claimed to be accomplished by the contrivance of Blood, of raising or lowering stages by applying steam power to a suitable apparatus were well known, as well as the contrivance by which such results were accomplished, and were in public use long before Blood's patent.

The answer claims that the apparatus covered by the Blood patents is not useful, and its use has been abandoned.

An amended answer was filed, which, besides describing more particularly the contrivance used by the marine brigade, alleged that in December, 1868, one J. Frank Hicks used a derrick or crane provided with ropes and pulleys, and operated by steam power, for the purposes of a freight hoister on board the steamer Magenta, and for hoisting and managing the staging on said steamer.

The schedule attached to the letters patent of A. John Bell, states that the object of his invention is "a more rapid, easy and effective means of shipping and unshipping the stage planks from steam water craft, and consists in a mode of operating said planks by connection with one of the steam engines employed to work or load the vessel."

His claim is thus stated: "I claim as new and of my invention and desire to secure by letters patent the arrangement of the staging C., power windlass, E. F. G. H. I., and supporting apparatus, J. K. L., the whole being constructed and operating substantially as and for the object set forth."

The staging shown in the drawing is the ordinary one used on steamboats upon the outer end of which is a bail, to which is attached a rope, which leads to the upper end of a gaff, the foot of

which rests on the deck while the upper end is supported by a rope attached to an upright mast or spar. This gaff and mast and the rope connecting them constitute to all intents and purposes a derrick, differing mainly from the derrick in common use, by the fact that the foot of the gaff or boom rests on the deck instead of resting against the mast or spar; so that we have a staging suspended by the bail at one end to a derrick. The staging so attached to the derrick is connected with a power windlass by which the stage is shoved out or drawn in, and the end of the staging as it is pushed out may be adjusted to the height of the bank upon which its outer end is to rest by the slipping of the rope attached to the bail. On the edge of the gunwail of the boat is a roller to enable the stage to move with greater facility.

The two patents issued to Hannibal S. Blood, which have been assigned to the complainants and the patent to William J. Perkins under which the defendants seek to protect themselves are simply improvements upon the derrick in common use, and nothing more.

The most cursory reading of Bell's patent shows that it is not intended to cover a derrick, nor a steamboat stage, nor a power windlass operated by steam, or other power. The invention claimed by Bell is for the combination of these three well known contrivances, to accomplish the handling of the stage with ease and rapidity. The roller on the gunwail of the boat is not an essential part of the combination, and is not mentioned in the patentee's claim. It is no defense to a suit for the infringement of this patent, to set up that the defendant has improved upon the derrick or upon the windlass, or upon the stage. If the combination is used, although some of its separate parts may be improved, it is an infringement.

The answer of the defendants does not deny that they handle and manipulate a steamboat stage by attaching it to a derrick by a rope and raise or lower it by means of a power windlass. They set up merely that they use an improved derrick different from the derrick shown in the specification of A. John Bell's patent, and different from the derrick covered by the patents of Hannibal S. Blood.

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In passing upon the issue of infringement, the question to be determined is, whether under a variation of form or by the use of a thing which bears a different name, the defendant accomplished by his machine the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure or purpose. If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention. *Foss v. Herbert*, 2 Fish., 31.

The material question is not whether the same elements of motion or the same component parts are used, but whether the given effect is produced, substantially, by the same mode of operation and the same combination of powers in both machines. *Odiorne v. Winkley*, 2 Gall., 54.

In determining the question of infringement, we are not to determine about similarities or differences, merely by the names of things, but are to look to the machines or their several devices or elements in the light of what they do or what office or function they perform and how they perform it, and to find that a thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result. *Union Refinery v. Matthiessen*, 2 Fish., 602.

The rule is, and so it has been settled, that if two machines be substantially the same and operate in the same manner, though they may differ in form, proportions and utility, they are the same in principle. *Evans v. Eaton*, 3 Wash., 449.

As between a device conceded to be new and a device claimed to infringe because an equivalent, the alleged infringer could not protect himself by showing that although his device was the equivalent of the patented device in all its functions, and in its construction and mode of operation, yet by other additional features it possessed other and further useful functions. Such a device, though an improvement upon the patented one, would be

an appropriation of it. *WOODEUFF, J.*, in *Surrem v. Hale*, Official Patent Reports, vol. 1, 437.

To constitute an infringement, the contrivances for the purposes in view must be substantially identical, and that is substantial identity which comprehends the application of the principle of the invention. *Page v. Ferry*, 1 Fish., 298.

It makes no matter what additions to or modifications of a patentee's invention a defendant may have made; if he has taken what belonged to the patentee he has infringed, although with his improvement the original machine or device may be much more useful. *Howe v. Morton*, 1 Fish., 587.

Applying these principles to the case in hand, there can be no doubt that the defendants have appropriated the invention covered by the patent of A. John Bell. That they have improved upon parts of the combination may be true; but they are using the idea first suggested by Bell, and covered by his patent, namely: the handling of a steamboat stage by means of a rope attached to a derrick, through force applied by a power windlass. The variations which have been made in the method of attaching the rope, in the form of the derrick, in the position in which the stage is placed on the deck, are immaterial variations, which do not affect the question of infringement.

As the patent to Bell bears date prior to the use of stages by the marine brigade, or the publication in Appleton's Dictionary of Mechanics, the defense of want of novelty cannot be maintained.

The averment that the device of Bell is not useful cannot be sustained. All the law requires as to utility is that the invention should not be frivolous or dangerous. It does not require any given degree of utility. If the invention is useful at all, that suffices. *Cox v. Griggs*, 2 Fish., 174; *Hoffheims v. Brandt*, 3 id., 218.

The result of these views is that there must be a decree for complainants, directing a perpetual injunction to go against defendants, as prayed in the bill, and a reference to a master for an account of profits.

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JOHN L. McCAULEY vs. W. P. KELLOGG et al.

1. The fact that holders of bonds issued by a state are prohibited, by the eleventh amendment to the constitution of the United States, from obtaining judgment on their bonds by suit against the state, in a court of the United States, does not authorize a court of equity, by decree, to compel the state officers to levy and collect a tax for the payment of principal and interest of the bonds.
2. A court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court.
3. A court of the United States will not compel, by injunction, the officers of a state to execute the laws of the state. To do so would be an attempt by the court to administer the state government.
4. An action in a court of the United States against the executive officers of a state, in their official capacity, to compel them to comply with a contract of the state by the enforcement of its laws, is, to all intents and purposes, an action against the state, and prohibited by the eleventh amendment to the constitution of the United States.

This was a bill in equity, which was heard upon the motion of complainants for a preliminary injunction. The defendants filed neither answer nor affidavits denying the averments of the bill.

The bill was filed by John L. McCauley, of the state of New York, on behalf of himself and all others who were similarly situated, and who were willing to make themselves parties complainant against W. P. Kellogg, who was governor of the state of Louisiana, Charles Clinton, who was auditor of public accounts of the state of Louisiana, Antoine Dubuclet, who was treasurer of the state of Louisiana, and The Louisiana National Bank, all of the defendants being citizens of the state of Louisiana.

The bill averred, in substance: That complainant was the holder and owner of bonds of the state of Louisiana, amounting in the aggregate to \$71,000, which were issued under three different acts of the legislature, authorizing their issue and providing for the levy of a tax for the payment of principal and interest thereof, and appropriating the means raised by such tax to that purpose and no other. That complainant purchased his bonds

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upon the faith of the contracts contained in the acts referred to, and especially upon the faith of the provisions of the general act of March 16, 1870, by which it was provided that the auditor of public accounts should, at the end of each year, estimate what sum, levied upon the entire taxable property of the state, would be sufficient to pay the interest on all bonds issued by the state, and that the sum so ascertained was thereby annually levied upon the taxable property of the state; that the tax so levied should be collected as other taxes, and should be known as the "interest tax," and when paid into the treasury should be credited to a fund to be called the "interest tax fund," and should be held sacred for the payment of the interest upon the bonds of the state.

That complainant purchased all of said bonds on the faith of article CXIV of the constitution of the state of Louisiana, adopted in 1864, and of article CXI of the constitution adopted in 1868, which provide, "that whenever the legislature shall contract a debt exceeding in amount \$100,000, unless in case of war, to repel invasion, or suppress insurrection, they shall, in the law creating the debt, provide adequate ways and means for the payment of current interest and of the principal when the same shall become due, and the said law shall be irrevocable until principal and interest are fully discharged, unless the repealing law contain some other adequate provision for payment of principal and interest of the debt;" and also on the faith of article CX of the constitution of 1868, forbidding the passage of any law impairing the obligation of a contract or divesting vested rights; and upon the faith of the provision of the constitution of the United States prohibiting a state to pass any law impairing the obligation of contracts; that more than \$100,000 of bonds had been issued under each of the laws under which the bonds held by complainant had been put forth.

That none of the foregoing contracts had been performed, but, on the contrary, defendants Kellogg, Clinton and Dubuclet had given out, that no interest maturing after December 31, 1873, on the bonds of the state, issued before that date, should be paid, nor should any principal of said bonds be redeemed; and had given out and declared, that they would not levy and collect

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the taxes provided by the aforesaid special contracts of the state, and would not set apart the special and sacred funds therein agreed to be set apart, and would not redeem any principal of said bonds.

That said Kellogg, Clinton and Dubuclet had given out, that their past and proposed violation of the contracts of the state, as above set forth, had been and were to be carried out under a plan to fund the state debt. That in pursuance of this plan, they had persuaded the legislature to pass an act known as the Funding Bill, being act No. 3, approved January 24, 1874.

This act provided in substance for the issue of bonds of the state, to be known as consolidated bonds, to the amount of \$15,000,000, which should be used for the purpose of taking up the bonds and warrants of the state, issued previous to its passage, at the rate of 60 cents of the new bonds to one dollar of the outstanding bonds and warrants, and for a tax of five and a half mills to pay the principal and interest of the new bonds, and declared that the total tax for interest and all other state purposes, except public schools, should never exceed twelve and a half mills.

This act, the bill of complaint alleged, the defendants proposed to execute, and pretended it was their duty so to do, whereas the said act was a nullity, because it was in violation of the constitution of the state of Louisiana, and of the constitution of the United States, in that it impaired the obligation of the said contracts made by the state of Louisiana with complainant and other holders of the bonds of the state; that said act No. 3 of the year 1874 purported at once to do away with all taxes theretofore levied and which it was agreed should be collected for interest and principal of complainant's bonds and other bonds theretofore issued, and to substitute a tax of five and a half mills only for the payment of the principal and interest of said consolidated bonds, whereas the bonds of the state theretofore issued amounted to the sum of \$22,433,800, and to comply with the contracts under which they have been issued would require an annual tax of eleven and a half mills on the dollar.

That it was the unlawful purpose of said act, and the defendants so construed and were about to execute it, to repudiate all of

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said contracts made with complainant and other holders of the bonds of the state with reference to the levy and collection of taxes for the principal and interest of said bonds, to nullify and hold for naught the said laws under which the outstanding bonds have been issued, to collect in future only five and a half mills of interest tax, which was less than half what was required to fulfill all the contracts under which the bonds outstanding had been issued, and to apply the proceeds of this inadequate tax, not to the bonds held by complainant and others, but to the so-called new consolidated bonds to be thereafter issued to the extent of \$15,000,000.

The bill further alleged that there were in the treasury \$500,000 interest-tax funds, and large additional amounts belonging to said tax funds should be received monthly and quarterly; but defendants had given out and declared that they would have no further use for said special funds, as they would pay no more interest maturing after December 31, 1873, on the outstanding bonds of the state.

That these acts and declarations of the defendants were with the intent to coerce complainant and other holders of the bonds of the state to acquiesce in the said "funding" scheme; that unless restrained, they would actually and positively violate the obligations of the several contracts herein set forth, and would refuse payment of all coupons maturing after December 31, 1873, on outstanding bonds, and suspend and refuse the redemption of said bonds.

The bill prayed that defendants might be restrained from executing said act No. 3 of 1874, from reducing the interest tax, which it was heretofore agreed should be collected for the present and future years, for the interest and principal of the state bonds now outstanding, in anywise except in strict accordance with the laws under which they were issued; from hindering or delaying the estimate and collection of taxes for interest and sinking funds, under the said laws of the general assembly, from in anywise hindering or delaying the payment of any interest coupons of any of the said outstanding bonds of the state under any of the pretenses or devices of said act No. 3, and from in any way hindering or delaying the estimate and collection of interest

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and sinking funds provided for by law prior to the adoption of said act No. 3 of 1874, the payment of the interest thereunder, or the redemption of the principal of said bonds.

The bill further prayed that the defendants might be decreed to comply with and specifically perform the contracts of the state, by setting apart the funds agreed therein to be set apart, by estimating the amount of tax required to comply with said contracts; by collecting the same as provided by said contracts; by depositing and holding the proceeds of the same according to said agreements, and by paying the interest on said bonds as it should mature, and redeeming the principal thereof according to said agreements.

An amended bill set out the provisions of an act, No. 55, passed by the general assembly of Louisiana, and approved March 14, 1874, the general purpose and effect of which was to forbid and prevent any officer of the state from assessing, collecting or enforcing the payment of any tax for the payment of the principal and interest of the state debt, the assessment and collection of which were not specially provided for by some act of the general assembly passed since the first day of January, 1874, and to forbid the governor, auditor and treasurer from setting apart any funds for the payment of the principal or interest of any bonds issued prior to January 1, 1874.

Several persons holding bonds of the state of Louisiana filed petitions, praying to be made parties complainant, which it is unnecessary particularly to notice.

Upon these bills, original and amended, the complainant moved the court to issue the injunction prayed for in the original bill.

Messrs. W. W. Howe and J. H. Kennard for complainants.

Messrs. W. H. Hunt, T. J. Semmes and E. C. Billings, for defendants.

Woods, Circuit Judge. It is obvious to remark that there are insuperable objections to so much of the prayer for relief as asks that the defendants may be decreed to comply with and specifically perform the contracts of the state by estimating and collecting the interest and sinking fund tax, and applying

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it to the payment of the principal and interest of the bonds. The objection is, that if there is a remedy at all, it is a remedy at law, namely: by the issuance of the writ of *mandamus*. If this suit were brought against a municipal corporation and its officers, to compel the collection of a tax to pay the interest on its bonds, the plain, adequate and complete remedy would be the legal writ of *mandamus*. It is true that before the writ could issue, the bondholders must have recovered a judgment at law on their bonds. *Bath County v. Amy*, 13 Wall., 247; *Graham v. Norton*, 15 id., 427.

It may be replied to this that the bondholders cannot lay the necessary foundation for the writ of *mandamus* in the United States courts, because they are prohibited from suing the state, by the XIth amendment to the constitution of the United States. But this fact may prove that there is no remedy for the complainants in the United States courts. It certainly does not follow that because there are obstacles to the adoption of the plain legal remedy, therefore the remedy is in equity. It might as well be claimed that because the bondholder could not go into a court of law and secure a judgment against the state upon his bonds, he might therefore go into equity and seek a decree against the officers of the state for the amount due on his bonds.

When the XIth amendment to the constitution declares, "that the judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or subjects of any foreign state," the purpose is clear to exempt states from suits upon their contracts, either at law or in equity, and the fact that this amendment interposes an obstacle to a suit at law against a state does not give a court of equity jurisdiction to enforce the same contract on the pretext that there is no remedy at law. Suits in both forums against a state are prohibited.

It is evident, therefore, that should this bill come on for final hearing, the decree prayed for could not be granted.

We may, however, consider the bill as one for injunction only, and the question now presented is, Can and ought the court to allow the injunction to go as prayed for?

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It is claimed by the bill and conceded by counsel for defendants that the bonds of the state of Louisiana held by the complainants are contracts, that the laws under which these bonds were issued, and which provide for the levy and collection of taxes to pay the interest and reduce the principal, and which declared that the same should be annually continued until the principal and interest of said bonds were fully paid; that these provisions of law entered into and formed a part of the contract between the state and the bondholder, just as completely as if the terms themselves were inserted in the body of the bonds. The state has therefore contracted that at a certain date named in the bonds she will pay the principal, that in the meantime she will pay the interest semi-annually to the holder of the bonds, and as an assurance that this part of her contract will be performed, she promises further that she will levy and collect an annual tax to make these payments, and that the revenue raised by this tax shall be set apart for the purpose of paying said interest and principal.

It is conceded that the state has made this contract with the complainant in this case.

Now to what end is the injunction sought in this case? It is: To compel the officers of the state to execute the contracts of the state by estimating, levying, collecting and applying to the payment of the bonds the tax originally provided by law for the payment of the interest and the redemption of the principal. It is true the prayer for injunction is that the officers of the state may be restrained from hindering or delaying the estimate, levy and collection of the tax, etc. But as the defendants are the officers whose duty it is to estimate, levy and collect, it is clear that such an injunction from this court would be mandatory and compel the performance of affirmative acts.

The first question presented by the prayer for injunction is, Can the officers of the state be compelled by injunction to do an affirmative act?

The complainant claims that the funding bill and the act of March 14, 1874, which in effect prohibit the collection of taxes for the payment of the principal and interest of the outstanding bonds of the state, are unconstitutional and therefore void. If

this be conceded, then the case is in the same plight as if these acts just named had never been passed, and as if the officers of the state, without pretense of warrant of law, were refusing to levy and collect the taxes which the state had agreed should be levied and collected and applied to the payment of these bonds. Has this court the power to compel them by mandatory injunction to do an affirmative act?

The authorities are adverse. The case of *Walkley v. City of Muscatine*, 6 Wall., 483, was a bill in equity to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants for the purpose of paying the interest on certain bonds issued by the city. It appeared that a judgment had been recovered in the same court against the city for \$7,666, interest due on the bonds held by plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had been requested to levy a tax to pay the judgment, but had refused; that the city authorities possessed the power under their charter to levy a tax of one per cent. on the valuation of the city property, and had made a levy annually, but had appropriated the proceeds to other purposes, and had wholly neglected to pay the interest upon the bonds. The bill prayed that the mayor and aldermen might be decreed to levy the tax and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest and costs.

Upon this case the supreme court says, "We are of opinion that complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the circuit court."

We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of *mandamus*. An injunction is generally a preventive writ, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases when it is used by the court to carry into effect its own decrees, as in putting the purchaser under a decree of foreclosure of a mortgage into possession of the premises. Even the exercise of this power was doubted till the case of *Kershaw v. Thompson*, 4 Johns. Ch., 609, in which the learned chancellor, after an examination of the cases in England on the subject,

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came to the conclusion he possessed it, not, however, by the writ of injunction, but by the writ of assistance.

In *Rogers Locomotive Works v. Erie Railway Co.*, 20 N. J. Eq., 379, the court, after a learned review of all the cases, both English and American, bearing upon the subject, announced the conclusion that a mandatory injunction will not be ordered upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. It is only in cases of obstruction to easements or rights of like nature, that maintaining a structure as a means of preventing their enjoyment, will be restrained, and the structure ordered to be removed as part of the means of restraining the defendant from interrupting the enjoyment of the right. To the same effect is the case of *Audenreid v. Railroad Co.*, 68 Penn. St., 370.

It is clear to my mind that the injunction asked for falls within the category of mandatory injunctions, and cannot therefore be granted on motion.

But the fatal objection to the motion of complainant is found in the character of his bill. It is either a suit in effect against the state of Louisiana, or if not, the parties defendant are merely nominal parties, having no real interest in the controversy. In either case, no decree can be made in the cause.

This case is clearly distinguishable from the cases of *Osborn v. The Bank of the United States*, 9 Wheat., 738, and *Davis v. Gray*, 16 Wall., 203, and other cases cited by complainant.

In the case of *Osborn v. The Bank*, the bill was filed by the bank to restrain Osborn, who was auditor of the state of Ohio, from acting under a void law of a state in the collection of a tax levied upon the bank, and for a decree against Curry, the late treasurer, and Sullivan, the incumbent treasurer, and Osborn, the auditor, for money illegally collected by them from the bank.

It was alleged in the bill that neither Curry nor Sullivan held the money as officers, but individuals.

The court in this case held that the suit was well brought, because the state was not nominally a party to the record, and the parties made defendant had a real interest in the cause, since their personal responsibility was acknowledged, and if denied, could be demonstrated.

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In the case of *Davis v. Gray*, Davis, who was defendant in the court below, and who was named upon the record as governor of Texas, was sought to be enjoined from casting a cloud upon the title of complainant to certain lands in Texas, by locating warrants thereon in pursuance of a void and unconstitutional enactment of the state. Although he professed to act as governor, he was impairing the rights of complainant without the authority of any valid law; he was acting in his own wrong and upon his own responsibility, and was personally liable.

In both these cases the object was to restrain individuals holding public offices from doing acts to the injury of complainant, for which there was no legal warrant, and by the doing of which they incurred a personal liability. How different is the case under consideration. Here is an attempt to compel the public officers of a state to do positive and affirmative acts as such, to compel them to carry out what the complainant conceives to be the law of the state, not in accordance with their own sense of duty, and their own interpretation of the law. In the case of *Kentucky v. Dannison, Governor*, 24 How., 109, it was held that neither the congress nor the courts of the United States could coerce a state officer, as such, to perform any duty imposed upon him by act of congress. Does it not follow, *a fortiori*, that a court of the United States cannot compel the governor of a state to execute a law passed by the state?

In *Osborn v. The Bank*, and *Davis v. Gray*, it was held that a United States circuit court might, in a proper case in equity, enjoin a state officer from executing a state law in conflict with the constitution, or a statute of the United States, when such execution would violate the rights of complainant. But no case has yet decided that a circuit court of the United States can compel the executive and administrative officers of a state to execute the laws of the state.

The dilemma is this: If the suit is against the defendants in their official character, and the claims made upon them are in their official character, the state may be considered a party to the record. *Madrazo v. Governor of Georgia*, 1 Pet., 110. If the suit is against the officers as individuals merely, and the offices they hold are given merely to describe their persons, they have

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no interest in the subject matter, and no decree should go against them.

In the view I have taken of the case, I have conceded what complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the bill just as if those acts had never been passed, to-wit, a bill to compel the defendants, officers of the state, to execute its laws. This may be done in the case of the officers of municipal corporations, but the sovereign power of a state cannot be so coerced. To do so would be to substitute this court for the executive officers of the state, to supplant their views of duty and the obligations imposed upon them by their official oath, by the discretion of this court and its official oath. In other words, it would be an undertaking upon the part of this court to administer the state government. This the court has no power and no inclination to do.

In my judgment, this is to all intents and purposes a suit against the state. The officers of the state, including the chief executive, are sued in their official capacity to compel them to execute the laws of the state. It is a suit to enforce a contract of the state to pay money. The officers are not sued as individuals who happen to be in public office, to prevent them from doing some act to the prejudice of complainant not warranted by law, as was the case in *Osborn v. The Bank* and *Davis v. Gray*. If a suit like this can be sustained, then the XIth amendment to the constitution of the United States is waste paper.

For the reasons stated, the motion for injunction is overruled.



CHARLES CASE, Receiver, vs. THE CITIZENS BANK OF LOUISIANA.

1. The word "insolvency," as used in the 52d section of the currency act (13 Stat., 115; Rev. Stat., sec. 5242) is synonymous with the same word as used in the bankrupt act.
2. To make transfers, assignments, deposits and payments void under said section, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made.

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This is a bill in equity, and was submitted for final hearing and decree upon the pleadings, evidence, and arguments of counsel.

Messrs. John A. Campbell, Thomas Allen Clarke, J. D. Rouse and F. F. Case, for complainant.

Messrs. Armand Pitot and M. M. Cohen, for defendant.

Woods, Circuit Judge. The 52d section of the "currency act" (13 Stat., 115) declares that "all transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any association, or of deposits to its credit; all assignment of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

Relying upon these provisions of the statute, the complainant, Charles Case, the receiver of the Crescent City National Bank, files this bill against the Citizens Bank of Louisiana.

The bill, after averring the appointment of the complainant as receiver, alleges, in substance, that between the 1st day of December, 1872, and the 6th of February, 1873, the Crescent City Bank drew bills of exchange on F. de Lizardi & Co., of London, amounting in the aggregate to £26,501 5s. 7d., each being payable in sixty days after sight, and sold the same to the defendant, the Citizens Bank.

That afterwards, about the 26th of February, 1873, the said Lizardi & Co. having, after the acceptance by them and before the maturity of the bills, failed, the defendant demanded from the Crescent City Bank indemnity against loss on said bills, and for the purpose of such indemnity the Crescent City Bank transferred to the defendant promissory notes, bills and evidences of debt amounting to \$150,000, which were then and there the property of the Crescent City Bank. That at the time of the transfer, the Crescent City Bank had drawn and had negotiated for value

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bills of exchange on Lizardi & Co. to an amount largely exceeding its capital stock; that the bank had provided Lizardi & Co. with funds to meet the same at maturity; that by the failure of Lizardi & Co. the bills would be dishonored and the bank held liable therefor, and that the funds provided for the payment of said bills had been then lost to the bank by reason of the failure of Lizardi & Co., and that by reason thereof and of other losses the bank was then insolvent; that its insolvency was known to itself and the defendant; that said notes, bills, and evidences of debt were transferred to the defendant in contemplation of the insolvency of the Crescent City Bank, and with a view to give a preference to the defendant over other creditors. The bill prays that the transfer of said assets be declared void, and that defendant may be compelled to account for them to the complainant.

The answer of the defendant, the Citizens Bank, which is given under the common seal of the corporation, denies all the material averments of the bill, except that the Crescent City Bank had provided Lizardi & Co. with funds to meet the bills drawn on them; that by the failure of Lizardi & Co., the said bills would be dishonored and the bank held liable therefor, and that the funds provided had been lost to the bank at the time of the transfer to the defendant of said assets.

The complainant files the general replication.

In passing upon the case, it is material to consider what it is necessary for the complainant to establish in order to render void the transfer of the notes, bills, etc., to the Citizens Bank.

The transfer must have been made after the commission of an act of insolvency, or in contemplation of insolvency, and with a view to give a preference to one creditor over another, or with a view to prevent the application of the assets of the bank in the manner prescribed by the currency act.

I know of no reason why a different meaning should be given to the word "insolvency" as applied to banks in the currency act, from the meaning given the same word in the bankrupt act as applied to traders.

"Insolvency, as used in the bankrupt act, when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up

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of his affairs, but a present inability to pay in the ordinary course of his business; or in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of his business, as men in trade usually do, and such must be the conclusion even though his inability be not so great as to compel him to stop business." *Wager v. Hall*, 16 Wall., 599.

This definition of insolvency, in my judgment, is the meaning of the word in the currency act.

It is only necessary that the insolvency should be in the contemplation of the bank making the transfer. The party to whom the transfer is made need not know of or contemplate the insolvency of the bank which makes the transfer.

Thus it was held by Mr. Justice STORY, under the bankrupt act of 1841, that to constitute a conveyance "in contemplation of bankruptcy," it was not necessary that the professed creditor should know of the debtor's insolvency, or should coöperate with him to obtain a priority of payment. *Peckham, Assignee, v. Burroughs*, 3 Story, 544.

The facts clearly established by the evidence, and about which there seems to be no dispute, are as follows: Between December 2, 1872, and February 6, 1873, the Crescent City Bank had drawn bills on F. de Lizardi & Co., of London, which had been sold by the bank, and which were held as follows:

By the Citizens Bank,	-	-	-	-	-	£19,400
By the Canal Bank of New Orleans,	-	-	-	-	-	5,500
By the State Nat. Bank of New Orleans,	-	-	-	-	-	5,000
By Eugene Kelly & Co.,	-	-	-	-	-	35,000
By Edward C. Palmer,	-	-	-	-	-	10,000
By Mr. A. Carriere,	-	-	-	-	-	4,000
By Duncan, Sherman & Co.,	-	-	-	-	-	5,000

and other bills held by other persons. So that at the time of the failure of the house of Lizardi & Co., there were bills outstanding drawn by the Crescent City Bank on Lizardi & Co., to the amount of £111,000.

The failure of the house of Lizardi & Co., the drawees and acceptors of these bills, took place on February 14, 1873, before the maturity of any of the bills, and was positively known to Summers, the president of the Crescent City Bank, on the 16th inst.

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By the transfer of notes, bills, and other evidences of debt, on February 26th, by the Crescent City Bank to the Citizens Bank, the latter was fully secured, for the bills held by it, drawn on Lizardi & Co. by the Crescent City Bank, to the amount of £19,400. On March 13th, in consequence of the failure of Lizardi & Co., the circulation of the Crescent City Bank went to protest, and the bank has since been put in liquidation.

The Citizens Bank lost nothing by the failure of the Crescent City Bank, having been fully secured for the bills held by it on Lizardi. The Canal Bank, Eugene Kelly & Co., Palmer & Carriere, received no security on or payment of the bills held by them, amounting to £54,500. The capital stock of the Crescent City Bank was \$500,000.

These facts show the commission of an act of insolvency by the Crescent City Bank, the insolvency of the bank, the transfer of notes, bonds, etc., and the preference of one creditor to another.

These facts alone do not, however, make the transfer void. It is necessary to the complainant's case to establish two additional facts:

1. That the transfer was made in contemplation of the insolvency of the Crescent City Bank, and
2. That it was made with a view to give a preference to the Citizens Bank over other creditors, and to prevent the application of said assets in the manner provided by the currency act.

If the complainant has established these facts in addition to those already stated, he has made out the case averred in his bill.

In passing upon the first point, it is pertinent to inquire, Was the Crescent City Bank really insolvent at the time of the transfer of the notes, bills, etc., to the Citizens Bank, on the 26th of February, 1873?

We have in evidence a report of the condition of the bank on the 14th of February, 1873, the very day that Lizardi & Co, of London, failed.

On that day the resources are stated at \$1,545,854.51, in which is included an item of \$561,958.01, under the head of "Other cash assets." This item is shown by the testimony of John Davis, the bookkeeper of the bank, "to consist of a class of

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bonds, stocks, etc., which bonds amount to 90 per cent. of the capital, which is \$564,000. The bonds are \$500,000. So that on account of \$564,000, there were \$500,000 bonds."

It is evident from this statement that this item of \$561,958.01 consisted mainly of the bonds of the United States to secure the circulation of the bank, with the premium thereon. It was not therefore a cash item, it was not available for the payment of the liabilities of the bank. The exhibit in which this item occurs, and the same item is found in the exhibits made on February 24th, February 28th and March 7th, was not a fair statement of the condition of the bank. This is made apparent by the fact that among the liabilities of the bank, the capital stock is not set down as a liability to offset the bonds deposited to secure circulation, with the premium thereon.

The item, therefore, of \$561,958.01, should be stricken from the statement of the resources of the bank. This leaves the resources at \$983,896.50, on February 14th. On the same day, the liabilities of the bank are stated at \$973,303.12, showing an excess of resources over liabilities of \$10,593.38 only. But on the 14th of February, Lizardi & Co., of London, failed. On that day, as shown by the evidence of Davis, the exchange clerk of the Crescent City Bank, the amount of the bills outstanding drawn by the Crescent City Bank on Lizardi & Co., of London, was £111,000, which, reduced to dollars at the current rate of exchange at that time, would be about \$604,000. The bank had sent forward about \$606,000 to cover these drafts; these remittances were misappropriated by Lizardi & Co., and none of the \$604,000 of exchange drawn by the Crescent City Bank on Lizardi & Co. was paid by them.

Here then is a bank which on February 14th shows resources over liabilities to the amount of only \$10,593, and on that day, by the failure of Lizardi & Co., has withdrawn from its available resources, for an indefinite period, the sum of \$606,000, with the prospect of losing in the end a large portion thereof. This statement makes perfectly clear the "inability" of the Crescent City Bank "to pay its debts in the ordinary course of business;" in other words, makes clear its insolvency. This loss or suspension of assets by the failure of Lizardi & Co. was greater than

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the available resources of the bank, added to its capital stock, by more than \$95,000.

Summers, the president of the Crescent City Bank, must have known of this condition of affairs before the 26th of February. In fact he must have known it; it is impossible he should not have known it as soon as he heard of the failure of Lizardi & Co.

Reynes testifies that "on the 15th of February, he received a dispatch from Eugene Kelly, of New York, who held bills of the Crescent City Bank on Lizardi & Co. to the amount of £35,000, that the acceptances were due that day, and that they were unpaid, and that such dishonor was virtually the failure of the bank, and that he expected no preferred payments. Reynes showed the telegram to Summers, the president of the Crescent City Bank, and insisted on his acting according to it."

Faurie, the cashier of the Crescent City Bank, testifies that the remittances sent by the bank to Lizardi & Co., of London, to pay those bills, were misappropriated and therefore the bills came back. "When we found the remittances were misappropriated, we thought it would break the bank."

"Some of the directors thought that if the remittances had been properly appropriated, they would come out all right; but if they had not been properly appropriated, they knew the bank had gone under. They said so. As soon as we were advised of the misappropriation of the remittances made by Lizardi & Co., of London, every officer of the bank knew that it was broken."

Geo. Jonas, the president of the Canal Bank, testifies, that as soon as it was known that the house of Lizardi & Co., of London, had failed, the credit of the Crescent City Bank was materially impaired, its business was diminished, there was urgency and anxiety among its creditors to obtain security. As soon as it was known that Lizardi & Co. had failed, every creditor wanted security if he could get it. He (Jonas) went to see Summers, the president, several times, to get security. Summers made an appointment to meet him on February 23d, and said he would bring bills receivable of a sufficient amount to cover the bills held by the Canal Bank. He failed to keep the appointment, but sent Jonas word the next day that his board determined to make no further preferences, and declined to give any security what-

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ever." He further testified, that upon the failure of Lizardi & Co., the stock of the Crescent City Bank ran down rapidly, and he heard of parties who were anxious to get rid of it for nothing, on account of their liability as stockholders in case of a failure.

Edward C. Palmer testifies, that he was in commercial business in New Orleans, and was director in a national bank at the time of the failure of Lizardi & Co. He says that upon that event there was but one opinion expressed, that it could not do anything else but ultimately break the Crescent City Bank. This was a general opinion among financial men that he talked with.

L. F. Generes, who had often been director of banks in New Orleans, testifies that immediately on the failure of Lizardi & Co., of London, there was great anxiety here about the Crescent City Bank from its relations with Lizardi & Co. It manifested itself some days after the failure was known. At first there was no anxiety, but still it grew up and became very urgent.

The result of this evidence is that upon the failure of Lizardi & Co., of London, the Crescent City Bank was insolvent. As soon as it was known that Lizardi & Co. had misappropriated the funds sent to pay the bills drawn on them by the bank, the insolvency of the bank was known to its cashier and directors, and was currently rumored and suspected by the interested public. The board of directors, as early as February 22d, had "determined to make no further *preferences*." Here is the official act of the board of directors, which, in effect, implies the insolvency of the bank. Is it possible that Summers, a member of and president of the board of directors, and who himself reported this action of the board to Jonas, did not know of the insolvency of the bank? The "contemplation of insolvency" is in my judgment clearly established.

It remains to inquire whether the transfer of notes, etc., made on the 26th of February to the Citizens Bank, in contemplation of insolvency, was made with a view to the preference of one creditor to another.

The fact is beyond dispute that the Citizens Bank was preferred, because it was paid in full, while other creditors, similarly situated, were not paid any part of their claims.

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Did Summers, in making the transfer of notes, etc., do it with a view to a preference? The law presumes he had in view the natural result of his acts. But defendant claims to have shown that the transfer was made to provide means to pay the bills drawn by the Crescent City Bank in London, and thus save the credit of the bank. Why then were not all the holders of the bills applied to to discount paper from the portfolio of the bank, and thus furnish the means, each to take care of his own bills. This arrangement was made with a part, but not with all.

It was made with the Citizens Bank and others. They were secured, and the bills held by them paid. The bills held by others were left unsecured, and were protested. How was the credit of the bank to be maintained by such a course?

E. C. Palmer, who held £10,000 of the bills of the Crescent City Bank, drawn on Lizardi & Co., heard of the failure of the drawers on February 15th, and within two hours went around to the bank. He saw Faurie, the cashier, who told him to go in and see Summers, the president of the bank. He found him talking with three or four of the directors. No offer was made to Palmer to transfer to him assets from the portfolio of the bank, in order to secure him. Doubtless he would have been willing to take care of the £10,000 of bills of exchange which he held, drawn by the Crescent City Bank on Lizardi & Co., if he could have been made secure out of the portfolio of the bank. So would the Canal Bank, and Eugene Kelly & Co., and Carriere. But no such opportunity was afforded them. These favors were reserved by Summers for the Citizens Bank and others.

The truth is, as is evident by the testimony, that one at least of the purposes of the transfer of assets to the Citizens Bank by the Crescent City Bank was to secure the Citizens Bank on the bills which it had purchased from the Crescent City Bank on Lizardi & Co. The pretense that this transfer was to sustain the credit of the Crescent City Bank is too transparent to deceive any one.

I am of opinion, therefore, after a review of all the evidence in the case, that the transfer by the Crescent City Bank to the Citizens Bank, of the notes, bills etc. mentioned in the bill of complaint, was made in contemplation of insolvency, with a

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view to the preference of one creditor to another, and is therefore utterly null and void.

Let a decree be entered as prayed in the bill.

APRIL TERM, 1874.

STEPHEN BIRD'S EXECUTORS VS. JOHN COCKREM, Receiver of the
New Orleans National Banking Association.

Receivers of National Banking Associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from state courts to the United States courts.

This cause was heard upon the motion of defendant to vacate the order removing the case from the fifth district court of the Parish of Orleans.

Messrs. J. Ad. Rosier and Geo. W. Race, for plaintiffs.

Mr. J. D. Rouse, for defendant.

BRADLEY, Circuit Justice. It is unnecessary to decide the question raised by counsel, whether the act of July 27, 1868, (Rev. Stat., sec. 640), allows all corporations, or only corporations of the United States, when sued, to remove their causes into the United States courts, since banks of the United States are excepted in any case; and also, since this is not a case against a corporation, but against a receiver, and the case is not within the 57th section of the National Banking Act (13 Stat., 116), which gives state courts concurrent jurisdiction with the courts of the United States, in suits against any association under the act, inasmuch as this is not a suit against the association. It is simply a suit against the receiver, for not surrendering property alleged to belong to the plaintiffs. Now unless a receiver, as such, has the privilege in all cases of being sued in the United

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States courts, I can see no ground for the removal of this cause from the state court. I am not aware of any such prerogative which a receiver of a national bank has over other persons. Officers and agents acting under authority of the United States, in making arrests, seizures, etc., during the war, may remove all suits brought against them for such cause, into the United States courts. But this is not one of that class of cases.

The order for removal must be vacated, and the cause remanded to the state court.

JACQUES LEVY VS. THE GREAT REPUBLIC.

Where everything was done by the officers of a boat which reasonable care and skill required in the navigation, neither the boat nor her owners will be liable for damage to freighters which may result from her grounding.

ADMIRALTY APPEAL.

Mr. R. H. Marr, for libellant.

Mr. H. J. Grover, for claimant.

BRADLEY, Circuit Justice. According to the testimony of the master and pilots of the Great Republic, the grounding of the steamboat which caused the delay and loss complained of in this case occurred in this way: The steamer was drawing about seven and a half feet of water. The place where the accident occurred was near a bar called Perry's Tow Head, and was known to be a dangerous and an uncertain place, where the channel, in times of floating ice, frequently changed. As they neared it, the master said to the pilot: "If you don't think that you can run this place with safety, I would rather you would round the boat and let her go into the bank." The latter stated, in answer, that the reports were that they had nine and a half feet of water there; that it was a very loggy and rough place. The master then said that they would have to float over it; telling the pilot to go into it, and go as easy as possible, so that if they did hit anything it

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would not hurt the boat. The steamer soon commenced rubbing the ground, and then they began to back her, and would have got clear again but for a small steamboat following them in the rear. She was so close that they were in imminent danger of collision. To prevent this catastrophe, they stopped backing, and then the Great Republic again grounded at the stem, and her stern was swung around by the current, and she became stranded and frozen up for several days.

The weather was extremely cold, several degrees below zero. Ice was forming as well as floating in the river. The boat was soon enveloped in such a pack of it as to endanger her safety. The subsequent efforts to get clear from their position, to relieve the vessel by unloading the cargo, and to get started again on the voyage, seem to have been dictated by the ordinary skill and care due to such a combination of circumstances.

The pilot's knowledge of the place in question depended on his examination of the river by passing up in a steamboat two nights previously. When passing this place, however, they took no soundings on account of the ice, the cold, and darkness of the night; but they had learned from another pilot coming down the river that there was nine and a half feet of water at this point, and that the depth of water or channel was where the Great Republic attempted to pass through.

The question is, whether everything was done in this case which reasonable care and skill required in navigating such a channel at such a time.

It was shown that the pilots on the Mississippi are in the habit of getting their knowledge of the channel and its changes from each other; that they have formed themselves into an association for this purpose, and that it is the duty of the members to communicate this information, and that all of them rely on it. Sounding, of course, is constantly resorted to in doubtful and dangerous places when sounding is practicable. But the master and pilots of the Great Republic state that it was impracticable to make soundings with the yawls, or sounding boat, on account of the ice, which was rolling very thick.

Under these circumstances, the question is reduced to this: whether at that time, and under those circumstances, they

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ought to have ventured into the place in question at all; whether, in other words, they had sufficient knowledge of the channel to authorize them to proceed; or whether they should have run to shore and laid by.

In my judgment, according to the custom of the river, they were justified in acting upon the intelligence which they had.

The libel must be dismissed.

LESASSIER & WISE VS. THE SOUTHWESTERN.

A transfer of a bill of lading, as a mere collateral to previous obligations, without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu*.

ADMIRALTY APPEAL.

Messrs. H. T. Hays, J. H. New and Percy Roberts, for libellants.

Mr. Wm. M. Randolph, for claimants.

BRADLEY, Circuit Justice. The libel in this case must be dismissed.

The goods, for the nondelivery of which by the steamboat the libel was filed, were seized by the vendors under their right of stoppage *in transitu*. The objections raised against the existence of the right, in this case, do not seem to me to be sufficient.

First. It is insisted that Barnett was the shipper of the goods; in other words, that the goods had been delivered to him by the vendors in Shreveport, and that he had shipped them, though using the names of Durham, Howell & Co. It is true, that Barnett, in his testimony, speaks of his having shipped the goods. But he does not say that he shipped them in the name of Durham, Howell & Co. He gives no such explanation of the bill of lading. The bill, therefore, stands as a very strong fact against that view of the case. *Prima facie*, the bill shows the real transaction as against the steamer.

In addition to this, it is in evidence that Durham, Howell & Co. brought the bill of lading to the office of Lesassier & Wise, and left it there for Barnett, the consignee, thus showing that they had shipped the cotton to his order. This circumstance corroborates the legal effect of the bill itself. Barnett's idea, that he shipped the cotton, is a very natural one under the circumstances. He procured it to be shipped, and, as between him and Lehman, Abrams & Co., to whom he intended to transfer it, he may be regarded as substantially the shipper. But in the eye of the law Durham, Howell & Co. were the shippers.

Second. It is contended that Barnett was not insolvent when the property was stopped by Durham, Howell & Co. His check for the cotton was not paid. That, certainly, was one pretty strong circumstance, though not conclusive. But it seems that he was, in fact, insolvent at the time. He has never settled his obligations then outstanding. Cotton was falling and he was largely obligated on cotton. Lesassier & Wise seem to have thought his situation such as to justify their being considerably alarmed. I think he was insolvent.

Third. It is contended that the delivery of the bill of lading by Isaacs, at the instance of Barnett, to Lesassier & Wise, to enable the latter to protect themselves, was such a transfer of it as cut off the right of stoppage *in transitu*. I do not think so. Lesassier & Wise advanced nothing, and gave up nothing, in consideration of this delivery. They simply took it as an additional provision against possible loss on their outstanding obligations for Barnett. It was a plank seized hold of by them to enable them to better protect themselves against the hazard of past transactions. It can in no sense be regarded as so much received in payment of indebtedness due. It was not so regarded by them at the time. They were not then sure that Barnett would owe them in the final result of existing speculations. But they feared he would. And they naturally desired to have additional security. A transfer of a bill of lading as a mere collateral to previous obligations, without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu*.

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In my judgment the decree of the district court must be affirmed and the libel dismissed with costs.

SAMUEL S. KIMBALL vs. CHARLOTTE H. TAYLOR.

1. The existence of martial law does not prevent the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees will be binding on the parties.
2. That provision of the constitution of the state of Louisiana which requires the style of process to be, "The State of Louisiana," does not apply to citations.
3. Under the practice of the clerks of the state courts of Louisiana, the absence of a seal from a citation in the copy of a record is no proof that the original citation was without seal.
4. Service of an irregular or erroneous summons or citation is not void, when the service is personal.
5. Property cannot be considered "abandoned," in the sense in which the word is used in the act of congress (13 Stat., 375, sec. 1), unless the owner was voluntarily absent, and engaged either in arms or otherwise in aiding or encouraging the rebellion.
6. The code of Louisiana required that before property could be seized and sold on an order of seizure and sale, the judgment debtor should be served with notice thereof. The defendant was expelled by the United States military authorities, from the city of New Orleans, and carried within the Confederate lines. During his enforced absence, his property in New Orleans was seized and sold by the sheriff, notice of the seizure and sale being served upon a *curator ad hoc* appointed by the court. *Held*, that the sale was void.
7. Such sale is not protected by the prescription of five years provided for in section 2309 of the Revised Code of Louisiana.

Submitted to the court on both the facts and the law.

Messrs. Allan C. Story and Wm. Grant, for plaintiff.

Messrs. L. Madison Day and H. J. Leovy, for defendants.

WOODS, Circuit Judge. This is a petitory action to recover possession of and establish title to certain real estate in the city of New Orleans.

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Both parties claim title under one Moses Greenwood. Plaintiff introduces an authentic act of sale from Greenwood to him, dated the 15th of December, 1870, and it is shown that in 1859, and for several years thereafter, Greenwood was in possession, and that defendant is now in possession.

The defendant offers in evidence a record of the sixth district court of the parish of New Orleans, in the case of *Eliza Chapin v. Moses Greenwood*, showing a judgment in favor of Mrs. Chapin against Greenwood, of the date of February 7, 1863, for \$1,000, with eight per cent. interest, a *fieri facias* issued thereon, dated December 16, 1864, and levied on the property in dispute in this case, and a sale thereof by the civil sheriff of the parish of Orleans, by virtue of said writ, on the 20th day of February, 1865, to Spencer Field.

The defendant also introduces deeds from Field to Mrs. Marsden, and from Mrs. Marsden to herself; the latter dated November 15, 1867. The defendant, besides claiming title, pleads the prescription of five years.

It is conceded that if the proceedings in the sixth district court of the parish of Orleans, as shown by the record, were effectual to divest the title of Greenwood, the defendant ought to prevail, otherwise the finding and judgment of the court should be for the plaintiff, unless the plea of prescription should be found a bar to plaintiff's recovery.

I will proceed to notice the objections made to the record of the sixth district court of New Orleans, in connection with the evidence offered in support of them.

It is shown in proof, that during the time of the proceedings in that court, martial law had been declared by the commanding general, and was in force (General Order of Major Gen. Butler, of May 6, 1862). The point is therefore made that there could be no civil court while martial law was in force.

Martial law is not inconsistent with the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees are binding on the parties. The evidence in this case shows that notwithstanding the declaration of martial law, the civil courts of the city of

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New Orleans were allowed to transact business. General Order No. 41, of Maj. Gen. Butler, of the date of June 10, 1862, prescribes an oath to be taken by judges, justices, sheriffs, attorneys and notaries, or other persons who hold any office which calls for the doing of any legal or judicial act. The clear inference from this order is, that officers having taken the oath required, were allowed to perform their duties, and the public history of this city shows that from the surrender of the city down to the close of the war, the civil courts were in the exercise of their functions. Among these was the sixth district court. I think, therefore, that it was a competent court to hear and determine. This view was sustained by the decision of the supreme court of the United States, in *The Grapeshot*, 9 Wall., 129, in which Mr. Chief Justice CHASE remarks: "It became the duty of the national government, whenever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice."

It is next objected to the validity of the record that the citation was defective, and therefore the court acquired no jurisdiction. The citation is entitled of the state of Louisiana and of the sixth district court of New Orleans. It is addressed to Moses Greenwood, the defendant, bears *teste* of the judge of the court, is signed by the clerk, and together with a copy of the petition on which it was issued, was served personally on the defendant, as appears by the return of the sheriff. The defects in the citation are alleged to be an absence of the seal of the court, and that the citation is not in the name of the state. The name of the state does appear in the title of the citation, but it is claimed that the style should be, "the state of Louisiana to Moses Greenwood." This is so inconsiderable a departure from what is claimed to be the law, as not to be worthy of serious attention. But in *Bludworth v. Sompeyrac*, 3 Martin, 720, it was held that to be the clause in the constitution which requires the style of process to be "the state of Louisiana" does not apply to citations.

In regard to the omission of the seal to the citation in the copy of the record presented to us, a sufficient answer is found in the

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case of *Medley v. Voris*, 2 La. An., 140, in which the supreme court of this state held "that the omission of a seal in the copy of a citation in a record of appeal will not be considered as establishing that the citation was issued without a seal, it being the common practice of the clerks not to copy the seal in making a copy of the citation." The court says: "As the party has not thought proper to produce in evidence the citation served upon him, neither this court nor the court below has been enabled to judge if the defect existed, and in the absence of such proof we will presume the clerk did his duty." But if it had been affirmatively shown to the satisfaction of this court that the citation was without seal, this objection to the citation could not stand, the record showing personal service. In *Hollingsworth v. Barbour*, 4 Pet., 477, the supreme court says: "There is an obvious distinction between this case and the case where there has been personal service of irregular or erroneous process. In that case the party has notice in part, and may, if he will, appear and object to or waive the irregularity." See also *Pursley v. Hayes*, 22 Iowa, 37; *Thompson v. Doe*, 8 Blackf., 336.

I am of opinion, therefore, in the proofs as presented, that Greenwood was legally served with a sufficient citation, and that the court acquired jurisdiction of his person.

It is next objected to the validity of the record and proceedings in the sixth district court, that the court had no jurisdiction to order a sale of the property in question, because it was "abandoned property," and the treasury agents were directed by law to take charge of and lease the same, and therefore no court had jurisdiction to seize and sell.

It is a sufficient answer to this to say that the property was not abandoned, as that term is defined in the statute: "Properties shall be regarded as abandoned when the lawful owner shall be voluntarily absent therefrom, and engaged either in arms or otherwise, in aiding or encouraging the rebellion." 13 Stat., 375, sec. 1. There is no evidence to show that Greenwood was voluntarily absent, and there is no proof that he "was engaged either in arms or otherwise, in aiding or encouraging the rebellion." So there is no proof before us to establish that the property sold by order of the sixth district court was, in fact,

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abandoned property. The evidence rather tends to prove that it was not. This objection to the record is therefore untenable.

Plaintiff next claims to have shown that Greenwood was expelled from this city by the military authorities pending the proceedings against him, and not permitted to return, and that as a consequence, all the proceedings had in the case after his expulsion were null and void.

The legal proposition embraced in this objection to the record is sound, and sustained by the authorities. *Dean v. Nelson*, 10 Wall., 158.

The evidence shows that the judgment against Greenwood was signed February 12, 1863. By general orders No. 35, of Maj. Gen. Butler, dated April 27, 1863, registered enemies of the United States were ordered to leave the department. Greenwood was a registered enemy. On May 9th he was specially ordered to leave the city of New Orleans, and about that time he was taken by a military guard and forcibly put on board a schooner in the old basin, and sent to East Pascagoula, Mississippi, within the confederate lines, where he arrived on the 17th of May, and whence he was forbidden to return, and did not return until long after the sale of the property in question.

No proceedings subsequent to the judgment were had in the case against him in the sixth district court until the 16th of December, 1864, when an order of seizure and sale was issued. The sheriff having returned that Greenwood could not be found, and that he was absent from the state, the court appointed a *curator ad hoc*, upon whom, according to the code of practice, notice of the seizure was served, and such proceedings were afterwards had as resulted in a sale of the premises in question. All these proceedings were in conformity to law, so that the only question now is, Did the absence of Greenwood from the state, under the circumstances mentioned, render them invalid and void?

This question is conclusively answered by the case of *La Sere v. Rochereau*, 17 Wall., 437. *La Sere* was expelled from New Orleans by the same order by which Greenwood was compelled to leave. During his absence, proceedings were instituted against him by executory process on two mortgages for the seizure and sale of the mortgaged premises situate in New Orleans.

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Service of notice was made upon a *curator ad hoc*, and after the legal delay, the sheriff advertised and sold the premises. These proceedings were declared void.

The finding and judgment must therefore be for the plaintiff, unless his claim is prescribed by the code of Louisiana. The defendant insists that the plaintiff's claim is so prescribed by sec 2809 of the Revised Code. This section declares "that all informalities connected with and growing out of any public sale made by any person authorized to sell at public auction, may be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women or interdicted persons." It is obvious that if it was necessary, as it is conceded it was, to serve Greenwood with process before an order of seizure and sale could be issued, that the want of such service is something more than an informality; that without such service the proceedings resulting in a sale are void, and that the sale was not made by a person authorized to sell. Therefore this section of the code has no application to a case of this kind. The plea of prescription of five years is therefore not sustained by the facts.

In accordance with the views expressed, the finding and judgment of the court must be for the plaintiff.

NOVEMBER TERM, 1874.

THE GRAPESHOT.

1. When the supreme court reversed a decree in admiralty and remanded the cause to the circuit court, with instructions to render a decree against the ship for the amount found due for supplies and repairs actually furnished and really necessary, and the supplies and repairs were furnished upon a bottomry bond which entitled the libellants to a premium of 19½ per cent. for the voyage: *Held*, that such premium should be included in the amount to be decreed by the circuit court.

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2. A bottomry bond contained no stipulation for ordinary interest, nevertheless it was *held*, that interest was recoverable at least from the date of the judicial demand.
3. Interest is not allowed in admiralty unless specially directed, but this rule so far as it governs the construction of the decrees of the supreme court only applies to cases where the decree of the court below in favor of libellant is affirmed. When such decree is reversed and the cause remanded, the circuit court may allow interest unless expressly forbidden to do so by the decree of the supreme court.
4. The fact that the ship against which the bottomry bond was asserted had been seized and sold on the libel, and the proceeds had remained for a long time in the registry of the court without producing interest, was no reason for refusing to allow interest on the sum found to be due.

This cause comes up for hearing on exceptions to the report of J. W. Gurley, master.

Mr. W. S. Benedict, for libellant.

Mr. James McConnell, for claimant.

Woods, Circuit Judge. The libel was filed upon a bottomry bond for supplies and repairs furnished the bark at Rio in the spring of 1858.

The cause had been once to the supreme court of the United States, which reversed the decision of the circuit court. The circuit court had rendered a decree for the entire sum secured by the bottomry bond. The supreme court was of opinion that some of the items in the bills secured by the bond were not subjects of bottomry, and that the actual necessity for some of the supplies and repairs was not shown. That court, therefore, reversed the decision of the circuit court and remanded the cause with instructions, "To refer the account for supplies and repairs to one or more commissioners, experienced in commerce and of known intelligence and probity, to ascertain under the instructions of the court, what portion of the supplies and repairs actually furnished to the ship was really necessary; and for the amount thus ascertained and approved by the court, to enter a decree for libellants."

The parties selected Mr. J. W. Gurley as master, and the selection was approved by the court.

The master took the testimony of but one witness, in addition to the evidence already in the record. This witness tes-

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tified to facts which had occurred fourteen years before he gave his testimony, and the evidence in the record shows that he must have been mistaken in his statement of facts. The master concluded, and we think properly, that this new evidence did not substantially change the case as it appeared in the original record.

The master reported that the principal sum due on the bond for supplies and repairs actually furnished the ship and really necessary, amounted to \$4,392.25.

1. The first exception is to the amount of this allowance. The libellant claims that because Clark, the master of the vessel, was also a part owner, he was authorized to make a bottomry bond on the ship anywhere and for any reason.

But it seems to me too late to review this question. If Clark was a part owner it must appear in the record, and the supreme court has decided that the whole bond cannot be sustained. It has, therefore, either found that Clark was not a part owner, or if he was, that he was not on that account authorized to make the bond unless there was a real necessity therefor. I regard this exception as raising a question already settled by the supreme court.

2. The second exception is, that the master did not allow the 19½ per cent. maritime interest on the \$4,392.25 which was stipulated for in the bond nor legal interest from and after the date of judicial demand, July 3, 1858. The master was not required to pass upon these questions. He has done what the order of reference required and no more. This exception must, therefore, be overruled, but this court will now determine the question for itself.

In admiralty appeals, the supreme court never does allow interest as such. *Hemmenway v. Fisher*, 20 How., 255; *Boyce's Ex'r v. Grundy*, 9 Pet., 275; Phillips' Pr., 260.

When in the opinion of the court interest should be allowed, it is included in the decree as a gross sum. Now the supreme court has directed specifically for what sum the decree in this case shall be, to wit: The amount found due for supplies and repairs actually furnished and really necessary.

The bottomry bond, which is the basis of the libel, expressly provides that the libellant shall be entitled to "a premium of

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19½ per cent. for the voyage, in consideration whereof all risks of the sea, seizures, enemies, fires, pirates, etc., are to be on account of" libellants.

By the terms of the bond, this premium is as much the due of the libellants as the principal sum loaned on the bond, and as there does not seem to have been any question raised in the supreme court of its allowance, if any part of the principal sum found was recoverable, and it is not excluded by the decree of the supreme court, we must allow the premium on the amount actually found due by the master.

But it is insisted strenuously that as neither the bottomry bond nor the decree of the supreme court says anything about the allowance of ordinary interest, none can be allowed.

Does the fact that there is no stipulation for ordinary interest in the bond preclude this court from allowing interest from the commencement of the suit, before which time the bond, if anything at all was due on it, was payable? The general common law rule is that the law does not imply a contract on the part of the debtor to pay interest on the sum he owes, although the debt may be of a fixed amount, and may have been frequently demanded. 2 Chitty on Con. (11th Am. Ed.), 950, and cases there cited.

But according to the American authorities, interest will be allowed after a demand of payment, even of an unsettled claim, for goods sold and delivered or services rendered, from the time of the demand, and the presentment of an account or commencement of a suit is sufficient demand on which to found and from which to date a claim of interest. *Barnard v. Bartholomew*, 22 Pick., 291; *McIlwaine v. Wilkins*, 12 N. H., 481, *et seq.*; *Selleck v. French*, 1 Conn., 32; *Gray v. Van Amringe*, 2 Watts & Sarg., 128; *Goff v. Rehoboth*, 2 Cush., 475.

Interest is allowed on liquidated demands in the admiralty as well as at law. *The Swallow*, Olcott, 334.

In suits for seamen's wages, interest is allowed from the time of demand, or if no demand be made, from the commencement of the suit. *Gammel v. Skinner*, 2 Gall., 45; *Sheppard v. Taylor*, 5 Pet., 675.

These authorities settle the principle, and there can be no

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question that the libellants are entitled to ordinary interest on the amount properly loaned on the bottomry bond, at least from the commencement of the suit.

But the claimant says that the question of interest has been ruled adversely to the libellant by the decree of the supreme court in this case. He says that the decree of the supreme court in this case, 9 Wall., 145, directs this court to ascertain "what portion of the repairs and supplies actually furnished to the ship were really necessary, and for the amount thus ascertained and approved by the court, to enter a decree for the libellants." That as this direction of the court says nothing about interest, none can be allowed.

To sustain this view we are referred to the case of *Boyce's Ex'r v. Grundy*, 9 Pet., 290; *Hemmenway v. Fisher*, 20 How., 255; to rule 23 of U. S. Supreme Court Rules, and to Phillips' Practice, Revised Ed., 257.

The rule of the supreme court and these authorities apply only to cases when the judgment or decree of the lower court has been affirmed. The holding is that unless the supreme court, in the affirmance of a judgment or decree, allows interest, it cannot be allowed by the lower court, when called on to execute the mandate.

But in the case of the *Grapeshot*, the decree of the circuit court was reversed, and the cause sent back to the circuit court to ascertain the amount due libellants, and with instructions to render a decree for the amount so ascertained. The supreme court never passed upon the question of interest. It never disallowed interest. The libellants are clearly entitled to it unless it is expressly disallowed. As well might it be claimed that libellants are not entitled to their premium of 19½ per cent. which is expressly provided for in the bond, because the supreme court makes no mention of it in its order remanding the case to this court.

Claimant further says, that no interest should be allowed, because the ship was seized and sold in August, 1858, and ever since that date the proceeds of the sale have been in the registry of the court or in the United States treasury, and claimant has had no use of the funds.

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This is no answer to the libellant's demand for interest. The claimant might have saved himself this loss by paying what was due on the bond, or if he had tendered the amount now found to be due, he could not have been required to pay interest. The libellants have asserted their rights in the ordinary way, in a court of justice. They are not to be punished, because in the administration of the law the claimant has been subjected to loss, a loss which he might have avoided had he chosen to take the proper steps to avoid it.

3. The third exception is, that the master erred in his construction of the words "were really necessary," contained in the decree of the supreme court directing this court "to ascertain what portion of the supplies and repairs actually furnished were really necessary."

"Necessity for repairs and supplies is proved when such circumstances of exigency are shown as would induce a prudent owner to order them." *Grapeshot*, 9 Wall., 141.

I have looked into the evidence in the record, and am not able to see that the master has been too strict in his construction of the words "really necessary." The fact is, he allows for all repairs which the evidence shows were actually made, and for all supplies actually furnished.

This exception must be overruled.

The other exceptions refer to small items in the account which the master has rejected. The evidence seems fully to justify the findings of the master in respect to these items. My opinion is that none of the exceptions are well taken, and they must be overruled.

In making up the amount of the decree, however, the premium of 19½ per cent. on the amount found due by the master will be allowed, and also interest at the rate of five per cent. per annum on the same amount from the date of judicial demand, to wit, July 3, 1858.

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HENRY S. McCOMB vs. THE BOARD OF LIQUIDATION et al.

1. An act of the legislature of a state authorized the issue of fifteen millions of dollars in new consolidated bonds, to be exchanged for old bonds of the state, at the rate of sixty cents of consolidated bonds for one dollar of the old bonds, and declared that the consolidated bonds should be used for no other purpose than to take up the old bonds on the terms aforesaid, and levied an annual tax for the payment of the principal and interest of the consolidated bonds, and declared that every provision of the act should be considered a contract between the state and the holders of consolidated bonds, and the terms of the act were accepted by many holders of old bonds, and the exchange of bonds made: *Held*, that a subsequent act of the legislature which authorized the payment of consolidated bonds to general creditors of the state, dollar for dollar, was a violation of said legislative contract with the holders of the consolidated bonds, and was null and void.
2. A bill in equity brought in a United States court by the holder of such consolidated bonds against certain state officers to enjoin them from issuing consolidated bonds to the general creditors of the state, dollar for dollar, is not a suit against the state, and is not prohibited by the eleventh amendment to the constitution of the United States.
3. The courts of the United States may entertain such a suit, and restrain the state officers from violating, under color of a void and unconstitutional law, the contract of the state with the complainants.

This was a bill in equity, which was heard upon the motion of complainant for a preliminary injunction. At the same time was heard a demurrer to the bill filed by defendants.

The bill was filed against William P. Kellogg, C. C. Antoine, Charles Clinton, Antoine Dubuclet, P. G. Deslonde and Michael Hahn, who, it is averred, constitute the board of liquidation of the state of Louisiana, and against the "Louisiana Levee Company." It alleges in substance that complainant is the owner of three consolidated bonds of the state of Louisiana for one thousand dollars each, issued by virtue of the provisions of an act of the general assembly, approved January 24, 1874, entitled "An act to provide for funding obligations of the state by exchanging for bonds," etc.; that by the provisions of said act, the natural persons above named as defendants, who were respectively the governor, lieutenant governor, auditor of public accounts, treasurer, secretary of state, and speaker of the house of representatives of the state of Louisiana, were constituted a board of liquidation, which

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was empowered to exchange the consolidated bonds, which they were authorized to issue by the act for all valid bonds and warrants outstanding at the passage of the act, at the rate of sixty cents on the dollar.

The bill further alleged that under and by virtue of an act of the general assembly passed February 20, 1875, the board of liquidation was authorized and required to issue to the defendant, the Louisiana Levee Company, consolidated bonds at par, for such sums as might be found due for work done by the company up to the first day of October, 1873, after deducting credits and payments, and that unless restrained, the board of liquidation would issue the bonds accordingly.

The complaint of the bill is that this action of the board will be in violation of the contract of the state, and will necessarily decrease the value of the bonds held by complainant; that the act of the legislature authorizing the issue of the bonds to the levee company is unconstitutional and void, and the bill therefore prays that the defendants, who constitute the board of liquidation, may be enjoined from issuing consolidated bonds to the levee company.

For a better understanding of the case made by the bill, it will be necessary to recite more fully the provisions of the constitutional and statute laws of Louisiana referred to in the bill.

Sec. 1 of the act of January 24, 1875, popularly known as "the Funding Bill," provides that for the purpose of consolidating and reducing the floating and bonded debt of the state, the governor, lieutenant governor, auditor, treasurer, secretary of state, and speaker of the house of representatives, are authorized to prepare and issue bonds to be known as "consolidated bonds of the state of Louisiana," * * to the amount of fifteen million dollars, or so much thereof as may be necessary.

Sec. 2 declares that the officers designated shall constitute a board of liquidation.

Sec. 3 provides that the consolidated bonds shall be exchanged by the board of liquidation for all valid outstanding bonds of the state, and all valid warrants drawn previous to the passage of the act * * at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds and all valid warrants.

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Sec. 5 provides that "the consolidated bonds herein authorized shall be held and used by said board of liquidation only for the purpose of exchange as aforesaid; said bonds shall be used for no other purpose or purposes than as authorized by this act," and imposes penalties on any member of the board of liquidation using or attempting to use them for any other purpose.

Sec. 7 of the act declares that "a tax of five and a half mills on the dollar of the assessed value of all real and personal property in the state is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other. And it shall be deemed a felony for the fiscal agent, or any officer of the state, or board of liquidators, to divert said fund from its legitimate channel as provided." * * "If there shall during any year be a surplus arising from said tax after paying all interest due in that year, such surplus shall be used for the purchase and retirement of bonds authorized by this act."

Sec. 11 of the act declares, "That each provision of this act shall be and is hereby declared to be a contract between the state of Louisiana and each and every holder of the bonds issued under this act."

Amendments to the constitution of the state of Louisiana were proposed by the legislature on the 24th of January, 1874, and adopted at the general election in November, 1874. These declare, among other things, that "The issue of consolidated bonds authorized by the general assembly of the state, at its regular session in the year 1874, is hereby declared to create a valid contract between the state and each and every holder of said bonds which the state shall by no means and in no wise impair."

The act of February 4, 1875, of which the bill complains as passed in defiance of the rights of complainant, constitutes the standing committees on lands and levees of the two houses of the legislature, a joint committee which is required to ascertain the amount due the Louisiana Levee Company for work done up to the first of October, 1873, after deducting all payments.

The act further provides that it shall be the duty of the

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board of liquidation, upon the presentation to them of a report and certificate from said joint committee of the amount due the levee company, to issue and deliver to said company a sufficient number of the consolidated bonds of the state of Louisiana to cover the indebtedness of the state to said levee company, as ascertained as aforesaid.

The Louisiana Levee Company has filed a demurrer to the bill, based on two grounds:

1. That the bill did not show sufficient matter of equity to authorize a decree for the relief prayed for; and
2. That this court had no jurisdiction over the acts and doings of the board of liquidation, or to prevent or hinder the general assembly of the state to acknowledge and adjust a debt due the defendant, and that the said parties are exempt from the jurisdiction and authority of the court in the premises.

The demurrer and the motion for the injunction were dependent the one upon the other, and were so considered and argued by counsel.

Mr. T. J. Semmes, for complainant.

Mr. J. A. Campbell, for defendants.

Woods, Circuit Judge: 1. It is apparent to the most careless reader, that by the passage of the so-called "Funding Act" the state of Louisiana undertook to make a contract with the holders of all valid outstanding bonds of the state and all valid warrants drawn previous to the passage of the act, who should accept its terms. What that contract was is not difficult to determine.

On the one hand the holders of the outstanding bonds and warrants drawn before the passage of the act were to surrender their evidences of debt, and receive in full satisfaction therefor sixty cents on the dollar, to be paid in the consolidated bonds of the state authorized by this act.

On her part the state agreed to issue consolidated bonds to the amount of fifteen millions of dollars, "or so much thereof as might be necessary," to take up the bonds and warrants at the rate just mentioned, and to pay the consolidated bonds over to the holders of the outstanding bonds and warrants, on the sur-

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render of their evidences of debt to the board of liquidation. As an inducement to the holders of the bonds and warrants, to take sixty per cent. of their claims, not in cash, but in other evidences of debt, the state agreed that the consolidated bonds, which were to be paid to these creditors of the state, should be held and used by the board of liquidation, "only for the purpose of exchange as aforesaid," that "said bonds should be used for no other purpose or purposes than as authorized by the funding act, and that a tax of five and a half mills on the dollar should be levied annually on all the taxable property of the state, to pay the principal and interest on the consolidated bonds, and the revenue derived therefrom should be set apart for that purpose and no other." These are the express provisions of the act, and the act itself in terms declares that each provision shall be a contract between the state and each and every holder of consolidated bonds.

Now what is it that the state, after entering into this solemn contract, proposes, by the act of February 20, 1875, to do? To take a portion of the consolidated bonds which were to be issued only to an amount sufficient to pay off the outstanding bonds and warrants at sixty cents on the dollar; which were authorized only for the purpose of being exchanged for bonds and warrants at that rate, which the state promised should be used for no other purpose or purposes, and any other use of which she declared shall be a felony; these bonds she proposes to give to a general creditor, dollar for dollar.

This, it seems to me, would be a most palpable violation of a solemn public contract.

The suggestion that the legislature has reserved the right to use such of the consolidated bonds as may not be necessary to take up the old bonds or warrants for the purpose of satisfying other creditors is a misconception of the funding act. In the first place, the contract is (sec. 1), that the state will only issue so many consolidated bonds as may be necessary to take up the outstanding bonds and warrants. (Sec. 3) that they shall be exchanged for all valid outstanding bonds and valid warrants drawn previous to the passage of the act, at the rate of sixty cents in consolidated bonds for one dollar in outstanding bonds

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and warrants; and (sec. 5) that the consolidated bonds shall be used for no other purpose or purposes than as authorized by this act. Sec. 7 provides for a levy of a tax of five and a half mills to pay the consolidated bonds, principal and interest, and scrupulously devotes the proceeds of the tax to that purpose.

Placing these provisions of the funding bill side by side, it is impossible to see where the state has reserved either an express or implied right to use the consolidated bonds to pay general creditors at par. The assumption appears to be at war, not only with the spirit and purpose of the funding act, but with its express declarations, and the attempt so to use the bonds is a flagrant breach of a contract, to which the honor and good faith of the state were pledged in the most explicit terms. An act of the general assembly which authorizes and directs such a violation of the contract of the state clearly impairs the obligation of the contract, and is therefore unconstitutional, null and void.

2. Has a holder of the consolidated bonds any remedy against this threatened breach of his contract? and if he has, what is it?

"When a state becomes a party to a contract, the same rules of law are applicable to her as to private parties. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." *Davis v. Gray*, 16 Wall., 232; *Curran v. Arkansas*, 15 How., 308.

It is objected to this bill, that in effect the state of Louisiana is a party, and that the XIth amendment to the constitution of the United States forbids such a suit.

This objection is answered by a reference to the cases of *Osborn v. The Bank of the United States*, 9 Wheat., 738, and *Davis v. Gray*, 16 Wall., 220. In the latter case the court says the cause of *Osborn v. The Bank*, decided: (1), that a circuit court of the United States may enjoin a state officer from executing a state law in conflict with the constitution of the United States, when such execution will violate the rights of complainants; (2), that when the state cannot be made a party, the court may decree against the officers of the state, in all respects as if the state were a party to the record; and (3), in deciding who are parties to the suit, the court will not look beyond the record.

The United States vs. 200 Barrels of Whisky.

This authority seems to answer the objection made to the jurisdiction of the court.

The case is this: The state of Louisiana has entered into a contract with certain of her creditors. Certain officers of the state, without authority of any valid law, but presuming to act under a law of the legislature, which is unconstitutional, and therefore void and no law, are about to violate the contract of the state and inflict irreparable injury upon the complainant. The authorities cited sustain the jurisdiction of the court, and justify it in interfering to prevent the mischief threatened.

It is insisted for the defense, that the attorney general of the United States is the only proper person to bring suit to have an act of the legislature declared unconstitutional and void.

The authorities cited to sustain this proposition (*Doolittle v. Supervisors*, 18 N. Y., 155; *Roosevelt v. Draper*, 23 id., 318; 1 Joyce on Injunctions, 746), concede that this may be done by a private person, when the act complained of involves some peculiar damage to his individual interests. This case falls clearly within this exception.

My conviction is, therefore, that the demurrer to the bill is not well taken, and that the prayer for injunction *pendente lite* ought to be sustained.

Ordered accordingly.

THE UNITED STATES vs. 200 BARRELS OF WHISKY. OTTO H. KARSTENDIOKE, claimant.

1. The spirits forfeited by sec. 96 of the act of July 20, 1868 (Rev. Stats., sec. 3456), as a penalty for the offenses therein mentioned, are the spirits owned by the distiller, rectifier or wholesale liquor dealer, or in which he has any interest as owner at the time of the discovery of his offense.
2. The failure of a rectifier to cause spirits to be gauged and stamped, as required by the 25th section of the act of July 20, 1868 (Rev. Stats., sec. 3320), is punishable by the 57th section, not by the 96th section of this act (Rev. Stats., sec. 3456).

Heard on Exceptions to the Information.

The United States vs. 200 Barrels of Whisky.

Mr. J. R. Beckwith, U. S. Attorney, for the United States.

Mr. J. D. Rouse, for Karstendicke.

Woods, Circuit Judge. The libel alleges that on the 18th of April, 1874, the whisky, being the property and in the possession of O. H. Karstendicke, was seized by the collector of internal revenue, and its forfeiture is claimed on these grounds:

1. Because Karstendicke, being engaged in the business of a rectifier, did, on the 5th of January, 1874, fill for shipment, sale and delivery, on his rectifying premises, a large number of barrels with rectified spirits, and willfully omitted to procure and cause a United States gauger to gauge and inspect the same, and place thereon the stamps required by law.

2. Because, being on the 5th of January, 1874, a rectifier of distilled spirits, he did, on that day and at other times, empty, for the purpose of rectifying the same, the contents of a large number of casks containing distilled spirits, and neglected to file with the collector of internal revenue any notice or statement, giving the number of said casks, the serial number of the same, the number of gallons in each cask, the kind of stamps on the same, and the particular name of said spirits as known to the trade, by whom and in what district said spirits were produced, and by whom and when they were inspected.

The first count of the information is based on the 96th section of the act of July 20, 1868 (15 Stat., 164; Rev. Stats., sec. 3456). This section provides that if any distiller, rectifier, etc., shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in carrying on or conducting his business, or shall do any thing by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, for the neglecting, omitting or refusing to do, or for the doing or causing to be done the things required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, etc., all distilled spirits owned by him, or in which he has any interest as owner, or if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

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The exceptions raise these questions:

1. Whether the spirits or liquors, which the law forfeits for a failure to comply with its provisions, are those owned by the distiller at the time of the commission of the offense, or at the time of its discovery, or at some other time, say the time of seizure.

2. Whether the failure by the rectifier to cause the liquors to be gauged and stamped, as required by the 25th section of the act of July 20, 1868, is punishable under the 57th section of the act, or whether it is one of those cases where no specific penalty or punishment is imposed, and is therefore punishable under the 96th section.

1. I think the fair construction of the 96th section is that the spirits or liquor owned by the distiller at the time of the discovery of the offense are what the law forfeits. Any other construction would render the penalty so difficult of application as to render it harmless. If the offense is discovered some time after its commission, it would be impossible, in most cases, to know what liquors and spirits the distiller had at that time, and his stock on hand at the date of the commission of the offense may have been sold, shipped and consumed before the discovery of the offense.

It cannot be fairly held that the spirits or liquors owned at the time of the seizure can be forfeited, for that would put it in the power of the revenue officers to postpone seizure until the distiller should have a larger quantity of spirits on hand, and thus put it in their power to determine the amount of the penalty.

I conclude, therefore, that the spirits owned by the distiller at the time of the discovery of his offense, and these only, are subject to forfeiture under the 96th section.

The counts of the information do not inform us when the offense was discovered, or whether the property seized was owned by the claimant at the time of the discovery. It is therefore defective, in that it does not show whether the property seized was owned by the distiller at the date of the discovery of his offense, or was subsequently acquired. It does not appear from the information that the property seized is liable to forfeiture.

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2. The 96th section of the act of July 20, 1868, only inflicts a penalty where there is no specific penalty imposed by any other section for the act or omission.

The 25th section of the act provides, that whenever any cask of rectified spirits shall be filled for shipment, sale or delivery on the premises of a rectifier, a United States gauger shall gauge and inspect the same, and place thereon an engraved stamp signed by the collector, showing the date when affixed and the number of proof gallons.

Now the matter complained of in the information is, that the claimant did not cause this to be done, and a seizure was made, not of those packages which were not thus stamped according to law, but of other spirits owned by the claimant at a date three months subsequent to the alleged act of neglect.

The question is therefore, whether the neglect to cause these casks and packages to be stamped is punishable by any other section of the act save the 96th.

I think the 57th section was intended to inflict a penalty for such neglect. It declares that all distilled spirits found after thirty days from the time this act takes effect, in any cask or package containing more than five gallons, without having thereon each mark and stamp required by this act, shall be forfeited to the United States. This covers the precise case stated in the information. The offense charged is the neglect to cause the casks and packages to be stamped according to section 25. Here in section 57 we find the penalty of such omission to be merely the forfeiture of the property. We cannot then say that the omission to stamp or cause to be stamped falls under the 96th section, for the penalty imposed by that section is only applicable to cases where there is no specific penalty imposed by any other section of the act.

My conclusion on this branch of the case is therefore, that where there is a neglect to cause casks or packages to be stamped as required by the 25th section, such casks or packages, and such only, are liable to forfeiture, and that other spirits or liquors of the distiller or rectifier cannot be seized and condemned for the offense.

Exceptions sustained.

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J. W. SHIRLEY and others vs. THE RICHMOND. MERCHANTS
MUTUAL INSURANCE COMPANY vs. THE RICHMOND and SABINE.

1. A neglect to keep a proper look out, which does not in any way contribute to a collision, cannot be alleged as a ground on which to recover damages caused by the collision.
2. A neglect of the well established rule, for navigating the Mississippi river, that ascending boats shall run the points, and descending boats the bends, which results in a collision and loss, renders the boat which disregards the rule liable for the damages.

ADMIRALTY APPEAL.

About half past two o'clock on the morning of the 11th of February, 1872, the steamers Sabine and Richmond collided with each other a short distance below Twelve Mile Point on the Mississippi river. As a result of the collision, the Sabine sank in about five minutes, and the Richmond received some damage.

The owners of the Sabine have filed their libel against the Richmond to recover for the damages sustained by the collision which they place at the sum of \$37,500, and charge that the Richmond was solely in fault.

The master and owners of the Richmond have filed their answer and cross-libel, in which they claim \$12,000 damages from the owners of the Sabine, alleging that the collision occurred through her fault.

The Merchants Mutual Insurance Company has filed its libel against both steamers, alleging that the company has been compelled to pay a large insurance loss, and that both steamers were in fault.

These two causes were consolidated by order of the court, and were tried and submitted together.

Messrs. R. H. Marr and B. Egan, for Shirley and others, libellants.

Messrs. M. M. Cohen and A. Voorhies, for the Merchants Mutual Insurance Company.

Messrs. E. C. Billings, A. de B. Hughes, L. A. Sheldon and Given Campbell, for the Richmond.

WOODS, Circuit Judge. The main question presented for decision is, Where does the fault which occasioned the collision lie?

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The prominent facts in the case appear to be as follows: The Richmond left the elevator, in the city of New Orleans, about one o'clock A. M., of the 11th of February, 1872, bound up the Mississippi river. She kept up the east bank of the river as far as Carrollton, and then crossed over and got under, and rounded Nine Mile Point on the west bank of the river. She kept close under the west bank until she reached the Kennedy plantation, about a mile above Nine Mile Point and two miles below Twelve Mile Point. The claimants say, that from Kennedy's plantation, the Richmond started to make a long crossing of the river towards the east bank, under Twelve Mile Point, with a purpose to run up along the east bank, and round Twelve Mile Point. The libellants, the owners of the Sabine, say, that the Richmond did not start to cross at the Kennedy plantation, but kept up the west bank of the river to the Waggaman plantation, deep in the bend of the river, opposite Twelve Mile Point, and then made a square crossing and came near the east bank, just under Twelve Mile Point.

In the meantime, the Sabine was descending the river with a cargo, principally of cotton. She rounded Twelve Mile Point, on the east bank of the river, and came in collision with the Richmond, just under the point, and between seventy-five and one hundred and fifty yards from the east bank. At the moment of the collision, the Richmond was headed for the east bank, and the Sabine was headed down stream. The stem of the Richmond came in contact with the Sabine on the starboard side, four or five feet aft the flag-staff, and cut through her in the direction of the capstan, a distance of about fourteen feet. The stem of the Richmond was deflected to the starboard by the force of the collision.

The Sabine charges the fault of the collision upon the Richmond:

1. Because she did not cross the river at the usual place, in the usual manner, but ran up deep in the bend to the Waggaman plantation, and from thence made a square crossing to the place of the collision, just under Twelve Mile Point.

The evidence to support this claim of the Sabine is entirely from persons who were on board of her. The witnesses that

speak to this point, who were upon the Richmond, all say that she commenced to cross at Kennedy's, just above Nine Mile Point, which is the usual place to commence crossing at that part of the river. The probabilities favor the theory of the Richmond. No possible motive is shown why the Richmond should take the circuitous and unusual course to run up to Waggaman's, deep in the bend, and then make a square crossing. Duffy, the pilot of the Richmond, testifies that he commenced at Kennedy's to make the usual long crossing, and that he had completed his crossing and was about a mile below Twelve Mile Point, and within one hundred and fifty yards of the east bank, when he first saw the Sabine coming around the Point. This evidence is corroborated by Cayton, also a pilot on the Richmond, by Court, the mate, by Davies, second mate and by Williams, Kane and Keheloe.

The witnesses for the libellants upon this point speak, not in a positive way, but, with the exception of Howison, the pilot of the Sabine, testify that she "looked" to be coming up the river near the bend shore. These witnesses had, by no means, so favorable an opportunity to know the course of the Richmond as those who were upon her, and whose duty it was to select and control her course; they speak of what appeared to be the course of the Richmond, and their version of the facts is not a probable one, for no motive is shown or can be conceived why the Richmond should run up to the Waggaman place and then make a square crossing. This course would have been unusual, circuitous, unnecessary and dangerous. It is in evidence that Waggaman's, where the crossing was commenced by the Richmond, according to the theory of the libellants, was nearly opposite to, or a little above Twelve Mile Point. The river is nearly a mile wide at that place. The Sabine blew her first whistle when she was nearly opposite Twelve Mile Point, and the Richmond did not change her course to cross the river until after that whistle. If these are the facts, it was impossible for the Richmond to cross the river and collide with the Sabine two or three hundred yards below Twelve Mile Point.

I conclude, therefore, that the witnesses for the Richmond give

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a correct account of her course from the time of leaving Nine Mile Point up to the time of the collision.

2. There is a complaint that the Richmond had two red lights, and not a red and a green one as required by rule XVI for western rivers, and that one of the red lights was on the jackstaff, behind the pilot house.

There are several witnesses for the libellants who testify that they did not see the green light, but the evidence is incontrovertible that the Richmond had both a green and red light, each in its proper place. The two clerks of the Richmond testify that they saw the green light on the starboard chimney after the collision, and the watchman says he took it down in the morning after the collision, lit and burning.

3. Libellants claim that there was no proper look-out on the deck of the Richmond at the time of the collision. But the evidence of Lanz, the steward, Duffy, the pilot, Court, the mate and Green, the master of the Richmond all show that both the master and the mate were on the roof before the collision occurred. Court was on the roof when the first signal was blown by the Richmond, which was before she crossed the river from Nine Mile Point. This first signal was not blown for the Sabine, but for the cars. The captain was on the roof immediately after the first signal was blown for the Sabine, and remained there until the collision.

But even if there had been no look-out, it would not alter the case, for the pilot of the Richmond saw the Sabine as soon as she rounded Twelve Mile Point, which was at as early a moment as any man on the look-out could have seen her.

I will now consider the misconduct alleged against the Sabine, in doing which, I shall notice other charges made against the management of the Richmond.

It is charged against the Sabine that she was out of her proper place on the river, and that this was the cause of the disaster. The testimony of numerous witnesses shows that it is the common law of the Mississippi river for the ascending boat to run the points, and the descending boat to run the bends; in other words, that the descending boat is required to keep in the main current or follow the thread of the stream, and the ascending boat to keep

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near the shore, crossing over from point to point so as to shorten the distance as much as possible, and at the same time sail in the eddy water near the banks.

This rule is not only spoken of by the witnesses, but has been recognized by the decisions of the courts.

The Georgia v. Dresden, Newb. Adm., 474; *Bates v. Natchez*, id., 490; *Goslee v. Shute's Ex'r*, 18 How., 466; *The Magenta*, 2 Abb., 496; *Williamson v. Barrett*, 13 How., 106; *Jones v. Pitcher*, 3 Stew. & Port., 135; *Drew v. Chesapeake*, 2 Doug. (Mich.), 33; *Steamboat Co. v. Whilden*, 4 Harring. (Del.), 228; *Moore v. Moss*, 14 Ill., 106.

This rule is as well settled and as generally observed as the rule of the road: "Keep to the right." Boats navigating the Mississippi river have the right to presume that it will be observed, and to act on that presumption.

The testimony in this case establishes conclusively that at the place where the collision happened, the river was nearly a mile wide, and that the boats collided within about one hundred and fifty yards of the east bank of the river. It is incontestibly shown that the Richmond was in the proper place for an ascending boat. She was near the east bank, under Twelve Mile Point. The Sabine being the descending boat should, according to the common law of the river, have been out towards the middle of the stream, following the main current, and should have passed the Richmond one-third or half a mile to the right. Instead of this, it cannot be disputed, that when she was rounding Twelve Mile Point, instead of taking the middle of the stream, she clung to the east bank of the river, just where she might expect to meet an ascending boat. To the disregard of this rule of the river by the Sabine, the collision must be attributed. If the Sabine had observed the rule, the collision would have been impossible. I have carefully examined the record, and I can find no excuse for the conduct of the Sabine. No reason is given and none existed why she could not keep the thread of the stream. The rule under consideration is not only one of great convenience and economy, but also of safety. It ought to be carefully observed.

After the Sabine rounded Twelve Mile Point, and the two

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steamers came in sight of each other, it is quite evident that each did all it could to avoid a collision; of this there can be no doubt.

There is much testimony in the record about the signals given by the two boats after they came in sight of each other, and some conflict of evidence; also about the management of the boats, how they were headed, whether their engines were stopped or not, whether they had head way or stern way at the time of the collision.

There cannot be the slightest doubt that whatever seemed likely to avoid a collision was done. It was a moment of excitement and alarm. The officers of the boats could not be expected to act with coolness and unerring discretion. In the hurry and terror of the imminent collision, they ought not to be held to any strict rule. They did their best to avoid a collision, after it became imminent, and failed. The fault lay further back. It lay, in my judgment, with the Sabine in not observing the salutary rule of the river: The ascending boat shall run the points and the descending boat the bends.

On this issue, therefore, I find for the Richmond. Accordingly there must be a decree dismissing the libel of the owners of the Sabine against the Richmond, and in favor of the owners of the Richmond against the Sabine for such damages as the Richmond suffered from the collision.

In the case of the Merchants Mutual Insurance Company against the Richmond and Sabine, the libel must be dismissed as to the Richmond, and a decree against the Sabine for such damages as the insurance company suffered from the collision.

JAMES LEVI et al. vs. THE NEW ORLEANS MUTUAL INSURANCE ASSOCIATION. SAME PLAINTIFFS vs. THE HOME MUTUAL INSURANCE COMPANY. SAME PLAINTIFFS vs. THE UNION INSURANCE COMPANY.

1. Mere carelessness, negligence or unskillfulness of the master and officers of a boat do not relieve the insurance companies from liability to pay a loss occasioned thereby, unless it is so expressly stipulated.

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2. It is otherwise when the master and officers of the boat are guilty of positive misconduct.
3. Misconduct is the transgression of some established and definite rule of action, where no discretion is left except what necessity may demand.
4. Negligence, carelessness and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor.
5. Section 3651 of the revised statutes of Louisiana of 1870 was intended to apply only in cases where the carelessness of the officers of a boat is so gross as to justify a criminal prosecution; in other words, to cases of misconduct.
6. A clause in a river policy of insurance, in which it was warranted and agreed by the insured that the boat should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat at or before the time of any accident or disaster," relieved the insurance company from liability to pay a loss resulting from a collision occasioned by the negligence of the pilot.
7. Three insurance companies insured a steamboat for \$4,500 each, valued in each of the policies at \$27,000. The boat was sunk by a collision. *Held*, that if she were a total loss, or if she were abandoned to the insurers, they were bound to pay the full sum insured.

The plaintiffs in these cases held policies of insurance issued by the defendant companies respectively, on the hull, engine, furniture and appurtenances of the steamboat Sabine, which was lost in consequence of a collision with the steamboat Richmond, near Twelve Mile Point, a short distance above New Orleans, all within the territorial limits of the the state of Louisiana, on the morning of the 11th of February, 1873.

The cases, by order of the court, were consolidated and tried together.

Messrs. J. Ad. Rosier, E. C. Billings and A. de B. Hughes, for plaintiffs.

Messrs. M. M. Cohen, A. Voorhies and Henry Chiapella, for defendants.

WOODS, Circuit Judge. The execution of the policies and the fact of the loss are admitted by defendants.

They defend against a recovery on several grounds:

1. Because the collision and consequent loss were caused by the carelessness, negligence and improper conduct of the master of the Sabine, and of his mariners and servants, and by their gross fault and violation of law and the rules of navigation.

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In the case of *Shirley et al. v. The Richmond*, just decided, *ante*, p. 58, I have found that the loss of the Sabine was the result of a collision with the Richmond, and that the collision was occasioned by the fault of the Sabine, in not keeping the middle or thread of the river, but running close to the left bank under Twelve Mile Point, where she encountered the Richmond, who was in her proper place.

It is claimed that this fact should defeat a recovery in this case on the grounds:

(a) That by the general law of insurance, the fact that the loss occurred through the fault of the officers of the boat, bars a recovery upon the policy of insurance.

(b) That the Code of Louisiana bars a recovery under the like circumstances; and

(c) That specially the Union Mutual Insurance Company is discharged from liability on its policy by reason of the following warranty in the policy: "Warranted free from any loss or damage occasioned by barratry, or by the negligence or misconduct of those in charge of the steamboat at or before the time of any accident or disaster."

I shall notice these grounds in their order.

"It is the settled rule that negligence and carelessness are insured against, while misconduct, which is a violation of definite law, a forbidden act, is never insured against." Flanders on Fire Insurance, 2d ed., 553; *Citizens Ins. Co. v. Marsh*, 5 Wr., 386; *Johnson v. Berkshire Ins. Co.*, 4 Allen, 388; *The Phoenix Ins. Co. v. Cochran*, 51 Penn. St., 148; *Chandler v. Worcester Fire Ins. Co.*, 3 Cush., 328; *Goodman v. Harvey*, 4 Adol. & Ellis, 870.

In the *Columbian Ins. Co. v. Lawrence*, 10 Pet., 507, Judge Story says: "The next question is whether a loss by fire occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriter is liable. In regard to marine insurance cases, this was a question much vexed in the English and American courts. But in England the point was completely settled in *Bush v. The Royal Exchange Ins. Co.*, 2 Barn. & Ald., 82, upon the general ground that *causa proxima, et non remota*

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spectatur; and therefore that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. The same doctrine was afterwards affirmed in *Walker v. Maitland*, 5 B. & Ald., 171, and *Bishop v. Pentland*, 7 Barn. & Cres., 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of *The Patapsco Ins. Co. v. Coulter*, 3 Pet., 222."

See also *St. Johns v. Ins. Co.*, 1 Duer, 371; *Hynds v. Schoenectady Ins. Co.*, 16 Barb., 119; *Gates v. Madison Ins. Co.*, 1 Seld., 469; *Catlin v. Ins. Co.*, 1 Sumn., 434; *Mathews v. Howard Ins. Co.*, 13 Barb., 234. These authorities establish conclusively the doctrine that mere carelessness and negligence of the master and officers of a boat do not relieve the insurance companies from liability for a loss occasioned thereby.

The question remains, Were the officers of the Sabine guilty of misconduct, or of carelessness and negligence only? Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness and unskillfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. *Citizens Ins. Co. v. Marsh*, 41 Penn. St., 386.

I think no better illustration could be given of what constitutes carelessness, negligence, and unskillfulness as distinguished from misconduct, than the conduct of the pilot of the Sabine, which caused the collision by which she was lost. He failed and neglected to follow a custom of the river, well known and established, but not prescribed by any positive law. That custom was that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel or thread of the river, so as to take advantage of the current. The neglect by the pilot of the Sabine to observe this rule resulted in the collision. But this was no misconduct, there was no willful violation of positive law. If the pilot could see along the bank of the river for a long distance, and there was

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no boat coming in an opposite direction, there was no positive law of the river to forbid a descending boat from running near the shore. But the fault was that he ran near shore at night, and when rounding a point where, if he happened to meet an ascending boat, there was danger of collision. This was negligence, carelessness, and unskillfulness, but it was not willful misconduct.

I cite two instances of misconduct taken from reported cases, which will show how far the conduct of the pilot of the Sabine falls short of misconduct. The captain of a steamer, while racing, for the purpose of making more steam, brought from the hold of the vessel a barrel of turpentine, knocked out the head and placed it so near the furnace that the fire was communicated to the wood upon which the turpentine was thrown and then to the barrel; such manner of use of turpentine being in contravention of an act of congress. This, as matter of law, was held to be misconduct, and to avoid the policy.

In *Chandler v. Worcester Insurance Company*, SHAW, Chief Justice, puts the case of a party insured, standing by the fire, which was yet so trifling that by throwing on a cup of water which was at hand, the fire might be extinguished, and yet neglecting to do so, as a case of misconduct, which would avoid a policy. 3 Cush., 328.

The case of the Sabine is not like either of the cases just mentioned. There was no willful violation of a positive law, nor was there such gross negligence as to amount to misconduct.

I am of opinion, therefore, that the first ground of objection to a recovery is not well taken.

2. It is claimed that the code of Louisiana bars a recovery against the insurance companies under the circumstances of this case. The law relied on is sec. 3651 of the Rev. Stats. of 1870, p. 709, which declares: "Any accident except such as is impossible to be foreseen or avoided, that may happen to any steamboat from racing, carrying higher steam than may be allowed by law, running into or afoul of another boat, or that may occur whilst the captain, pilot or engineer is engaged in gambling or attending any game of chance, or hazard, or whenever an accident happens from the boat being overloaded, the owner of the boat shall

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be responsible for all loss or damage, and shall be barred from the recovery of freight or insurance, and the officer violating the provisions of this section shall be subject to a fine of not less than five hundred nor more than two thousand dollars, and imprisonment for not less than three months nor more than three years; and in the event of loss of life being the result of such accident, then said officers shall be adjudged guilty of manslaughter."

This act was passed in 1834. Whether it is still in force has been a question raised but not decided by the supreme court of Louisiana. *Caldwell v. The Insurance Company*, 1 La. An., 85.

But considering it to be still the law, it clearly appears that it was intended only to operate in cases where the carelessness of the officers of the boat was so gross as to justify a criminal prosecution, and in cases where loss of life occurred, a prosecution for manslaughter. In other words, there must have been misconduct on the part of the officers of the boat. The whole tone and spirit of the section seems to indicate this. I have already expressed the opinion that there was no misconduct of the officers of the Sabine which resulted in the collision. I am of opinion, therefore, that this section of the revised statutes does not bar a recovery in these cases.

3. In the policy of the Union Mutual Insurance Company, but in neither of the others, is this stipulation: "It is also warranted and agreed by the assured, that the steamer shall be navigated in strict compliance with the provisions of any and all acts of congress regulating or pertaining to the management of vessels propelled in whole or in part by steam, and with the rules adopted by competent authority under any such act or acts, and free from any loss or damage by barratry, or by the negligence of those in charge of the steamboat at or before the time of any accident or disaster."

It is claimed for the *Union Mutual Insurance Company* that this warranty must have been strictly complied with or there can be no recovery against it.

It is not shown by the record that the Sabine was not navigated in strict compliance with the acts of congress or with the rules adopted under such act. The fault committed by the

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Sabine was in the nonobservance of a rule or custom of the river. It is not shown or claimed that the loss was occasioned by barratry, and we have found that there was no willful misconduct, but only negligence in the management of the boat. But the negligence of those in charge of the boat, at or before the time of any accident or disaster, which occasions the loss, is expressly warranted against in this policy, and if that warranty is binding upon the assured, it will be a bar to a recovery.

The clause in this policy, upon which the Union Mutual Insurance Company relies, is an unusual one, as counsel for the company have taken pains to show. But it is printed like all other parts of the policy in large leaded type, and it is made a distinct paragraph, and the words, "it is also agreed and warranted by the assured," with which the paragraph commences, are printed in type much larger than the body of the paragraph. The remark of the supreme court of the United States in *Insurance Co. v. Slaughter*, 12 Wall., 409, that "in order to avoid just cause of complaint it would be better for insurance companies to employ type large enough to arrest the attention of an interested party," can have no application to this case. We find this warranty in this policy conspicuously printed, and we cannot presume that it was inserted without the knowledge of the assured. We cannot make contracts for parties or act as their guardians to supply the want of care and vigilance in the conduct of their business. If the assured did not know that such a warranty was to be found in the policy, it was because he did not take the trouble to read it. We find it in the policy and it is as much a part of the contract as any other, and is as binding on the parties as any other.

Having found that the loss to the Sabine was occasioned by the negligence, carelessness and unskillfulness of her pilot, the case of the Union Mutual Insurance Company is fully within the express warranty, and there can be no recovery against that company. *De Hahn v. Hartley*, 1 Term, 343; 1 Arnold on Insurance, 584.

As to the other companies, the defenses which they have set up have been found to be untenable.

The question remains, therefore, What ought to be the amount

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of the recovery against the New Orleans Mutual Insurance Association, and against the Home Mutual Insurance Company?

In the policies executed by the companies, the Sabine was valued at \$27,000, and each policy was for the sum of four thousand five hundred dollars. If the Sabine were a total loss, or if she were abandoned to the insurance companies, they must pay the full sum insured. But the Sabine was not a total loss, for she was raised and repaired. Was she abandoned?

The policies of both the New Orleans Mutual Insurance Association and of the Home Mutual Insurance Company contain these clauses:

"And it is agreed that in case of any loss or misfortune aforesaid, it shall be the duty of the assured to use every reasonable effort for the safeguard and recovery of the said steamboat and every part thereof, and if recovered, to cause the same to be forthwith repaired, if practicable; to the charges whereof the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value herein; and in case of the neglect or refusal of the assured, or their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, then the said company shall have the election to interpose and recover said steamboat or any part thereof, and cause the same to be repaired for the account of the assured; to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy.

"And in no case whatever shall the assured have the right to abandon until it is ascertained that the recovery and repairs of the said steamboat are impracticable, nor shall the assured have the right to sell the wreck or any part thereof without the written consent of said company."

The Sabine was raised by a wrecking company, and after being so raised, she was libeled for salvage and sold, and her purchaser had her repaired at an expense of \$3,100. These facts being established, it is clear that the insured had no right to abandon under the terms of these policies, for they had no right to abandon until it was ascertained that the recovery and repairs of the

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steamboat were impracticable. This was never ascertained, for it was not true, and the right to abandon did not exist.

I have examined the evidence to see whether there was in fact an abandonment, and an acceptance of the abandonment by the insurance companies. The evidence fails to satisfy me that there was a purpose to abandon, or that the insurance companies intended to waive their right under their policies, and accept the abandonment.

There can, therefore, only be a recovery against the New Orleans Mutual Insurance Association and the Home Mutual Insurance Association as in case of no abandonment. The case will be referred to a master to ascertain and report from the evidence now on file the amount to be paid by each company under the terms of the policy.

A. FEATHERMAN VS. THE LOUISIANA STATE SEMINARY OF LEARNING AND MILITARY ACADEMY.

1. The property of a seminary of learning which is a public corporation under the control of officers appointed by the state, and managed in the manner prescribed by law, and all whose property has been received either from the state directly, or has been granted by congress to the state for educational purposes, and which is required to educate free a certain number of students to be named by the governor, cannot be taken in execution on a judgment recovered against it.
2. When the personal property of such an institution is levied on, it is not necessary to file a bill in equity to restrain the sale. It may be done in Louisiana by intervention and third opposition.

This cause was heard upon a rule to revoke an order restraining the marshal from further proceedings upon an execution issued in the principal case.

Mr. H. D. Ogden, for motion.

Mr. J. O. Fuqua, contra.

Woods, Circuit Judge. A *fieri facias* was issued upon a judgment recovered in this court by Featherman against The Louisi-

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ana State Seminary of Learning and Military Academy. It was levied on 6,500 volumes of books and other personal property, as the property of the defendant in execution, and the marshal was proceeding to advertise and sell the same, when the state filed her intervention and third opposition, claiming that the property levied on was the property of the state, and praying that the marshal be restrained from proceeding further with the sale under the execution.

The marshal was restrained by the order of a judge of this court, and the plaintiff in execution now moves the court to dissolve the order.

The State Seminary is a public and not a private corporation. It is, by an act of the legislature, placed under the superintendence of a board of visitors, one of whom is the governor, and another the superintendent of education, and twelve others to be appointed by the governor. The fund which constitutes its only endowment is the proceeds of land donated by congress. The state has made frequent appropriations for its support. In 1867, the legislature appropriated out of the general fund \$5,000 to enlarge the library. It appropriated \$31,000 in 1869 out of the general fund for the general use of the seminary, \$5,000 of which was appropriated for the purchase of apparatus and books. In 1870, \$20,000 were appropriated to the seminary to supply losses occasioned by the fire, which destroyed the buildings of the institution, and in 1871, another appropriation was made of \$10,000 for the purchase of books.

The institution has not only been under the exclusive control of officers appointed by the state, and managed in the manner specifically pointed out by the legislature, but all its property, except a few insignificant donations of books, has been received either from the state directly or has been granted to the state by congress for educational purposes, and it has been required to receive free a specified number of students to be named by the governor. It is therefore clearly one of that class of "public corporations which are founded for the public, though not for political or municipal purposes, and the whole interest in which belongs to the government." Ang. & Am. on Corp., sec. 14.

Can the property of such an institution be seized on execution?

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It seems to me that the marshal would have the same right to levy upon the furniture and other property of the state, used in the institution for the deaf, dumb and blind. The only difference between the cases is that the overseers of the State Seminary are made a body corporate, with power to sue and be sued, while the board of administrators in the deaf, dumb and blind institution is not.

But this fact does not any the less make the corporation a public corporation, nor its property any the less the property of the state. I am therefore of opinion that the order forbidding the marshal to proceed with the execution ought not to be revoked.

It has been objected that the state has mistaken its remedy, which should have been by regular bill in equity. I do not think the objection well taken. The property levied on is personal property. At common law, the remedy would be replevin, but the jurisprudence of Louisiana has substituted for this common law action a proceeding called an intervention and third opposition. There is no necessity, therefore, for resorting to equity. It is not a case for the interference of a court of equity. There is a remedy at law, and the practice of this state points out what it is. It has been followed in this case, and we are required by the practice act of 1872 to sustain it. *The Bank v. Labitut*, 1 Woods, 11.

APRIL TERM, 1875.

In re HATHORN and BATCHELOR.

1. The bankrupt court, in a proceeding by two partners in a firm of three, to have the partnership adjudicated bankrupt, has jurisdiction over the partnership property, although the third partner, in a proceeding in a state court to settle the partnership, and to obtain a decree for the amount due him from his copartners, has had himself appointed receiver and is in possession of the partnership assets.

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2. In such a case, the bankrupt court may enjoin such third partner from disposing of the assets of the partnership, or from any interference with them until the question, whether or not the firm is bankrupt, can be tried.

The firm of Hathorn & Batchelor consisted of Fergus Hathorn, T. J. C. Batchelor and A. J. Reid. It was dissolved on the 13th of November, 1874, by the withdrawal of Hathorn. On the 20th of the same month Hathorn filed a petition in the fifth district court of the parish of New Orleans against his late partners, in which he stated, that the partnership had been dissolved by his own withdrawal, and that owing to disagreement between himself and them, an amicable settlement of the partnership could not be effected, and in which he prayed for an accounting, for a settlement of the partnership, for a decree in his favor against the other members of the late firm for what would appear to be due from them to him on such settlement, and for a receiver for the partnership property. To this petition an answer was filed by the defendants, averring that the firm was insolvent, that there was no necessity for a receiver, and declaring a purpose on the part of defendants to go into bankruptcy.

On January 4, 1875, the state court decided that the partnership was insolvent, and decreed the appointment of a receiver, and on the 12th of January, ordered that Fergus Hathorn be appointed receiver, on giving bond in the sum of \$10,000.

In the mean time, to-wit: on the 11th of January, 1875, Batchelor and Reid, the other members of the late firm, filed their petition in the United States district court, in which they alleged, that said firm of Hathorn & Batchelor, and they, individually, were insolvent, and praying that they might be adjudged bankrupt. The adjudication was made in conformity with the prayer of the petition, and Berry Russell and C. W. Wood appointed assignees. Afterwards, on the 16th of March, 1875, an order was served on Fergus Hathorn to show cause on the 20th of the same month, why the firm should not be declared bankrupt, and its property and effects turned over to said assignees for administration.

Hathorn filed an answer, denying the insolvency of the firm and demanding a trial of the issue by a jury. This demand rendered a decision of the issue impossible until the appointment of a district judge for this district. These matters having

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transpired on the 5th of April, the assignees filed their petition in the bankrupt court, praying an injunction against Hathorn, forbidding him from making any disposition of partnership property and assets, or from any interference therewith until the issue of bankruptcy *vel non* of said firm could be tried.

This petition was submitted to the circuit judge during a vacancy in the office of district judge, for an order directing the injunction to issue as prayed for. It was objected that this court had no jurisdiction to make this order, because all the assets of the firm were in the hands of the state court for administration.

Messrs. W. O. Denegre and B. F. Jonas, for petitioner.

Mr. E. W. Huntingdon, *contra*.

Woods, Circuit Judge. It has been held in a case where the facts were almost identical with the facts in this, that one member of a firm is not prevented from calling the partnership into court, and having it declared bankrupt because of the proceedings in the state court. *In re Noonan*, 10 B. R., 330.

The inference is inevitable, that the bankrupt court has the right in such case to administer the bankrupt property, notwithstanding the order of the state court placing it in the hands of a receiver.

It seems to me, that the position taken by respondent is equivalent to a denial of the power of the bankrupt court to adjudge a firm bankrupt, and administer its assets, if one of the members has applied to the state court for the settlement of the partnership and the appointment of a receiver: in other words, that a failing firm may defeat the operation of the bankrupt act by applying to a state court to settle its affairs and distribute its assets.

"The design and purpose of the bankrupt law is, that the property of insolvents shall be secured to their creditors in the very mode pointed out thereby, with all the facilities for its appropriation, all the security for its administration, all the safeguards against fraud, all the protection against device to establish false claims, fictitious debts and illegal or inequitable preferences, which that act provides, and in the summary man-

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ner in which the proceedings are required to be conducted. It is not, therefore, for the debtors, or for the debtors and some of the creditors, to say, we can devise a better, or safer, or more economical mode of reaching the same final result. If it were true, it would be only saying, we will resort to an expedient to defeat the bankrupt law, and our reason therefor is, that we think our plan is wiser and better than that which congress has seen fit to prescribe." WOODRUFF, Circuit Judge, *In re Bininger*, 7 Blatch., 275. See also *Thornhill v. The Bank*, 5 B. R., 367; *In re Merchants Ins. Co.*, 3 Biss., 162; *In re Independent Ins. Co.*, 6 B. R., 260; *In re Safe Deposit Institution*, 7 id., 398.

This is not the case where a creditor is proceeding in a state court to enforce his claim against the property of his debtor, and has had a receiver appointed before the proceedings in bankruptcy were commenced, but it is the case of a member of a firm against which a petition in bankruptcy is pending, seeking to have the assets of the firm administered by the state court for his own benefit, and that he may enforce his individual claim to the partnership assets against his copartners. To hold that such a proceeding bars the action of a court of bankruptcy, or protects the assets of the firm from administration in the bankrupt court, would be to allow all copartners at their option to defeat the bankrupt law, and transfer the power and jurisdiction of the bankrupt courts to the state courts in all cases of the insolvency of partnerships.

In my judgment, the assets of this firm ought to be preserved by the order of the bankrupt court to await the result of the trial of the issue of bankruptcy *vel non*, and the injunction ought to issue to restrain Hathorn as prayed for in the petition of the assignees.

Ordered accordingly.

Casey, Receiver, vs. La Societé de Credit Mobilier.

NOVEMBER TERM, 1874.

N. W. CASEY, Receiver of the New Orleans Banking Association,
vs. LA SOCIÉTÉ DE CREDIT MOBILIER DE PARIS and others.

1. The preference of one creditor to another by a national bank, mentioned in sec. 5242, Rev. Stats., is a preference given to the creditor to secure or pay a preëxisting debt.
2. When a national bank, being embarrassed and in need of assistance, receives a loan of money or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, this is not giving him a preference over other creditors, within the meaning of sec. 5242, Rev. Stats.
3. The legislature of Louisiana has left it in doubt whether indorsement as well as delivery is essential to the pledge of a negotiable instrument.
4. The receiver of an insolvent national bank holds only the estate and title of the bank in its assets, and he has no greater rights in enforcing their collection than the bank itself would have had.
5. Neither the bank nor its receiver could recover possession of negotiable securities pledged by the bank for advances to it, on the ground that the pledge was ineffectual for want of indorsement of the securities, while at the same time holding on to the assets to secure repayment of which the pledge was given.
6. When a national bank agreed to deposit with a certain commercial firm in pledge a portion of its assets to secure a loan to be made to itself, and the loan was received by the bank, it was *held*, that there was no legal obstacle to the depositing of the assets according to the contract, arising from the fact that the president of the bank was a member of the firm with which the deposit was to be made.
7. A national bank which makes a contract not authorized by its charter cannot repudiate the contract, and at the same time retain its fruits.
8. When a national bank pledged a portion of its assets to secure a loan to itself, and the notes pledged were changed from time to time as they fall due, and others substituted in their stead, and this was according to the contract between the bank and the pledgee: *Held*, that the pledge of such substituted notes was not void.

The case as presented by the pleadings and proofs was substantially as follows: On the 12th of July, 1873, the New Orleans National Banking Association, a corporate body organized under

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the national banking act June 3, 1864 (13 Stat., 99), was engaged in the banking business in the city of New Orleans, and continued to carry on business until the 4th day of October, 1873, when it suspended payment. On the said 12th day of July, 1873, the defendant, "Société de Credit Mobilier," of Paris, entered into an arrangement with the said banking association through Charles Cavaroc Sr., its president, whereby the "Société" agreed on its part to accept bills of exchange to be drawn by the banking association, payable ninety days after sight, to the amount of one million francs, and the association agreed to place with the société ten days before the maturity of said bills the amount thereof. The banking association further agreed to deposit securities in the hands of the commercial firm of C. Cavaroc & Son, of which said Charles Cavaroc Sr., was a member, for the purpose of securing the société against loss from the failure of the association to place the amount required to meet said bills at maturity. The said firm of C. Cavaroc & Son was constituted by the société its agent to receive and hold said securities.

In pursuance of this arrangement, on or about the 12th of July, 1873, bills of exchange were drawn upon the société by the banking association at ninety days' sight to the amount of one million francs, and the same were sold by the banking association, and the proceeds, amounting to \$218,450.34, were appropriated by the banking association — were credited on its books to the société, and the bills were accepted by the société.

On the day of the date of the drafts, or the day following, a list was made out of notes due the association, amounting to \$220,021.43, and the notes named in the list were put in an envelope and handed to C. Cavaroc & Son, by direction of C. Cavaroc Sr., the president of the association, to be held as security for the société, to protect it from loss by reason of its acceptance of the drafts.

It was subsequently stipulated by C. Cavaroc Sr., on behalf of the association, that as soon as any of said notes matured, they should be replaced by others of like amount. Some time subsequent to the 12th of July, C. Cavaroc Sr., fearing that the notes already set apart would not be sufficient to secure the société for its acceptance of said bills, caused another list of notes, amount-

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ing to about \$100,000, to be made out, and the notes to be deposited with C. Cavaroc & Son, as additional security.

As notes matured and were paid or renewed, they were replaced by others, in pursuance of the agreement above stated.

The evidence showed that on the 12th of July the association was embarrassed, and that long before its suspension, on the 4th of October, it was insolvent.

When the banking association suspended payment, C. Cavaroc & Son claimed to hold all of said notes then in their hands, amounting to \$325,011.26, to secure the société for its acceptance of said bills.

After the suspension of the bank it was placed by the order of the comptroller of the currency, in the custody of John Cockrem, as receiver. Cockrem having resigned, the present complainant was appointed receiver in his stead.

The bill asks the court to adjudge and decree that all of the said notes held by C. Cavaroc & Son belong to and are the property of said banking association, and that the same, and all the proceeds thereof be placed in the hands of complainant as receiver, to be administered and applied to the payment of the claims of the creditors of said association.

The bill is based upon the 52d section of the national currency act (Rev. Stat., sec. 5242), which declares as follows:

“That all transfers of the notes, bonds, bills of exchange and other evidences of debt to any association, or of deposits to its credit, all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.”

Messrs. J. D. Rouse and J. R. Beckwith, for complainant.

Messrs. Thomas Allen Clarke, Thomas L. Bayne and Henry Renshaw Jr., for La Societé de Credit Mobilier, of Paris.

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Messrs. Edward C. Billings, John Finney and H. C. Miller,
for various other defendants.

Woods, Circuit Judge. The claim of the complainant is that the alleged transfer of the notes and assets of the banking association to C. Cavaroc & Son, to secure the société for its acceptance of the bills of the association, was a transfer thereof in contemplation of insolvency, with a view to prevent the application of the assets in the manner prescribed by the national currency act, and with a view to the preference of one creditor to another; that such transfer is therefore null and void, and that said notes are still the property of the association, and applicable to the payment of its debts.

It has been held by this court that to make "transfers, assignments, deposits and payments" void under the 52d section of the currency act, it is only necessary that the insolvency should be in the contemplation of the bank making the transfer, and not that it should be known to or contemplated by the party to whom they are made. *Case, Receiver, v. The Citizens Bank, ante*, p. 23; *Peckham, Assignee, v. Burroughs*, 3 Story, 554.

The evidence in the case satisfies my mind that the banking association, at the time it made the arrangement already recited with the société, to wit: on the 12th of July, 1873, was in an exceedingly embarrassed condition, if not actually insolvent. Although C. Cavaroc Sr., its president, testifies that he did not at that time think that the bank was insolvent, he had abundant reason to know soon after that date that it was embarrassed and in a critical situation. This is evidenced by his application for assistance to other banks of the city of New Orleans. In my judgment the evidence shows so much clearly, but it does not show more.

But conceding that C. Cavaroc Sr., the president of the bank, at the time he transferred the notes to C. Cavaroc & Son, for the security of the société, knew that the association was insolvent, will that fact render the transfer made under the circumstances recited void?

That alone is not sufficient. One of two alternatives must exist:

(1) It must be with a view to prevent the application of the assets in the manner prescribed by the currency act, or (2) with a view to the preference of one creditor to another.

Is it the meaning of the section of the currency act on which the bill is based, that after a national bank is in contemplation of insolvency, no person could do business with it except at the risk of having any means he may put under the control of the bank, no matter under what solemn contract for security, confiscated for the use of the general creditors of the bank? If this is the construction to be given to the 52d section of the currency act, then the moment a bank becomes embarrassed, it must give up and suspend payment, for all who come to its assistance must do so without security. In my judgment, the preference of one creditor to another, mentioned in the 52d section, is a preference given to an existing creditor for a preëxisting debt. If a customer or friend of a bank, knowing it to be embarrassed and in need of assistance, proffers it, for instance, a loan of \$50,000 in cash, on receiving security for the amount by a transfer of a part of its portfolio, that cannot be fairly construed as giving him a preference over other creditors. Other creditors are not injured by such a transaction, for the securities that such a creditor takes out, he leaves an equivalent in cash. He becomes a creditor solely on condition of receiving security.

The policy of the law is plain, namely: to prevent preference among creditors holding preëxisting debts. It clearly was not the purpose of the act to forbid the bank from giving security to its friends for means to be advanced on the spot or in the future. The general creditors are not injured by such an arrangement; they may be greatly benefited by it.

Take the case in hand. Suppose the association were actually insolvent on the 12th of July. The société in effect puts one million of francs into the possession of the bank, and takes security for it. Is the general creditor any worse off? The bank had nothing when the securities were transferred. It gets dollar for dollar for what it transfers. Can that be called giving a preference to one creditor over another? As claimed by counsel for defense, it is in effect an exchange of values rather than the giving of a preference to a creditor.

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It seems to me to be established, beyond all controversy, by the evidence in this case, that the pledge of the notes of the association complained of was not made in contemplation of insolvency, but it was a struggle on the part of the officers of the bank to avoid insolvency; it was not made to give preference of one creditor over another, but it was a plan adopted by the bank to secure means to carry on its business with a view to be able to pay all its creditors.

The construction claimed by complainant for the 52d section of the currency act would make the banks a trap in which the means of their friends, furnished on the pledge of securities, would be drawn in and applied to the payment of the general creditors.

In my judgment the construction placed on the 35th section of the bankrupt act is applicable also to the 52d section of the currency act.

That section of the bankrupt act declares that any sale or other disposition of property made by a person insolvent, or in contemplation of insolvency, within six months before the filing of a petition in bankruptcy, by or against him, by any person who has reasonable cause to believe him insolvent, such sale being made with a view to prevent the property coming to his assignee in bankruptcy, etc., shall be void. Under this section it has been held that a sale made in good faith, for the honest purpose of discharging a debt, and in the confident expectation that by so doing the person could continue business, will be upheld. *Tiffany v. Lucas*, 15 Wall., 410.

So in *Cook v. Tullis*, 18 Wall., 332, it was held that an exchange of values may be made at any time, though one of the parties to the transaction may be insolvent; that there is nothing in the bankrupt act that prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to delay or defraud his creditors or give a preference to any one, and does not impair the value of his estate. And in *Tiffany v. The Boatmen's Institution*, 18 Wall., 376, it was held that a man really insolvent, but not having yet openly

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failed, and hoping to overcome his difficulties and to carry on his business, violates no provision of the bankrupt act by pledging his property for money lent, this money being lent at the time when the pledge was made. See, also, *Clark, Assignee, v. Iselin*, 21 Wall., 360.

On the strength of these authorities, construing a provision of the bankrupt act similar to the 52d section of the currency act, and upon my own independent judgment of what is the purpose and intent of said section, I am of opinion that the original transfer made by the banking association to the société of the assets mentioned was not void.

But the complainant insists that the transfer was void, because not made in compliance with the code of Louisiana. It is claimed that the code requires that when a negotiable instrument is pledged by a debtor it must not only be delivered to the creditor to whom it is transferred, but must be indorsed (Civil Code, art. 3123), and as it was conceded there was no indorsement of the notes in question, the attempted transfer was ineffectual to carry title.

There has been some confusion in the legislation of Louisiana upon this subject, so that it is not by any means clear whether an indorsement as well as delivery of a negotiable instrument is necessary in order to complete an act of pledge. The act approved March 15, 1855, entitled "An act relative to pledges" (see Fuqua's Civil Code, 421, note), appears to have been a re-enactment of the act of 1852 (see acts of 1852, p. 15).

The first section of this act declares that when a debtor wishes to pawn promissory notes, bills of exchange, etc., he shall deliver to the creditors the notes, bills of exchange, etc., so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith.

There can, it seems to me, be no doubt that the purpose of this section was to make the delivery of a promissory note without indorsement sufficient as an act of pledge.

But in a subsequent revision of the statute law of the state, the provision requiring indorsement was allowed to remain; so that we have in the same statute book an article declaring that in-

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dorsement as well as delivery is necessary to the pledge of a promissory note, and another article in effect declaring that indorsement is not necessary. In my judgment it is not necessary to determine in this cause whether indorsement is or is not essential.

The receiver holds only the estate and title of the bank in its assets. His title is the same as that of an assignee in bankruptcy. It will not be pretended that the bank could recover back the assets which it had pledged and delivered to the agents of the société because they were not indorsed, and at the same time hold on to the proceeds of the drafts, for the acceptance of which the assets were pledged, unless there was fraud; and there was no fraud in this case.

An assignment in bankruptcy, like any other assignment, by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. *Mitford v. Mitford*, 9 Ves. Jr., 100; *Gibson v. Warden*, 14 Wall., 248; *Campbell v. Slidell*, 5 La. An., 274; *Mitchell v. Winslow*, 2 Story, 630; *Ex parte Dalby*, Lowell's Dec., 431.

There seems to be no reason why the position of receiver of an insolvent bank under the currency act is any better than that of an assignee in bankruptcy. If the receiver holds the same title to the assets of the bank that the bank itself held, he cannot avoid a pledge which the bank could not avoid. He is not a third person, in the sense of the Civil Code.

In the case of *Matthews v. Rutherford*, 7 La. An., 225, it was held that a notarial act of pledge, or a written act registered in a notary's office, is a formality which is necessary to protect the payee against third parties, but its omission is unimportant as between pledger and pledgee.

I am of opinion, therefore, that the failure to indorse the notes pledged by the bank is a defect of formalities in making the pledge of which neither the bank nor the receiver can take advantage.

It is further claimed by the complainant that C. Cavaroc Sr., the president of the association, could not at the same time act as president and agent of the association and as the agent of the société.

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It is true that the same person cannot sell as the agent of one and at the same time buy as the agent of another, and a contract made by one who acts as the agent of both parties may be avoided by either principal. See Story on Agency, sec. 211 and note. Such a contract, made by a person acting as agent for two principals, involves an absurdity. But in this case the contract was made between the "société" and the "association," the latter acting through its president. But it seems to me clear that there was no legal obstacle, the contract having been made and being in force, to the turning over by the association, acting through Cavaroc, its president, of the assets in pledge to be held by the commercial firm of C. Cavaroc & Son. In fact, C. Cavaroc & Son were mere depositaries or stakeholders, and all stakeholders are agents for both parties.

It is further claimed by complainant that Cavaroc, the president of the banking association, could only act by authority of the charter or by vote of the directors in making the pledge of the assets of the association, and that no such authority is found in the charter or minutes of the board of directors. The minutes of the board of directors are evidence, however, that they knew what arrangement had been made between their bank and the "société," and they approved it by voting a compliment to C. Cavaroc Jr., by whose agency the arrangement had been made. The books of the bank showed that it had received a million of francs as the result of this arrangement. It is impossible that the directors should have been ignorant of these facts—they never repudiated the contract nor returned to the société the fruits of it. This is a ratification.

The acts of a corporation, evidenced by a vote written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal, and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual. Abb. Dig. on Corp., 579, and cases there cited.

A corporation which has received the benefit of a loan cannot avoid liability on a mortgage to secure its payment by denying the authority of those who contracted the loan on its behalf.

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Bissell v. Railroad Company, 22 N. Y., 258; *Bank v. Dandridge*, 12 Wheat., 70, 71.

It is claimed, lastly, by the complainant, that the contract between the banking association and the société was not legitimate banking business and could not be lawfully carried out.

We are not cited to any clause in the national currency act forbidding such a contract, and can see no reason why the association might not lawfully make it.

But conceding that the currency act, which is the charter of the association, did not authorize such a contract, it does not follow that the association can repudiate the contract and keep its fruits.

Corporations have no right to violate their charters, but they have capacity to do so and to be bound by their acts when a repudiation of such acts would result in manifest wrong to innocent parties. *Bissell v. Railroad Company*, 22 N. Y., 258.

When it is a simple question of capacity to contract arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity. *Navigation Company v. Weed*, 17 Barb., 378; see also *Dispatch Line v. Bellamy Man. Company*, 12 N. H., 205; *Moss v. The Rossie Company*, 5 Hill, 137.

I am of opinion, therefore, that even admitting that the business carried on under the contract between the association and the société was irregular and not within the limits of legitimate banking, that having made the contract and enjoyed its fruits, neither the association nor its receiver can demand to keep the money of the société, which was received by virtue of the contract, and require the société to deliver up the assets that were transferred to it in consideration of the contract.

Complainant further insists that the notes pledged by the association were changed, from time to time, as they fell due, and others substituted in their stead, and that this renders void the pledge, at least so far as such substituted notes are concerned.

The evidence leaves no doubt on my mind that such substitution was made. In fact, it is admitted by defendant. But has the substitution the effect claimed by complainant?

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The case of *Clark, Assignee, v. Iselin*, 21 Wall., 360, is a pointed authority to sustain the negative of this proposition, and settles this objection to the title of defendant conclusively against complainant.

I have gone over the grounds relied upon by complainant, to avoid the pledge and transfer of the assets of the New Orleans Banking Association to the *Société de Credit Mobilier*. I am unable to find that any of the grounds are tenable. In my judgment the pledge of these assets was a good one to secure the société against loss by the failure of the association to comply with its contract, and the receiver is not entitled to the pledged notes, or their proceeds, until the société has been made whole.

The bill must therefore be dismissed, and the injunction heretofore allowed dissolved.

ABRAHAM BARKER vs. JACOB BARKER'S ASSIGNEE and others.

1. As a general rule, a voluntary conveyance, made by a grantor in easy circumstances and in no pecuniary strait, to his wife or children, cannot be impeached, because voluntary, at the instance of creditors who became such long after the execution of the conveyance.
2. To impeach a conveyance made under such circumstances, it must be shown to have been fraudulent, or made with a view to protect the property conveyed from future debts.
3. A deed not at first fraudulent may become so by being concealed from the public, so that the grantor gets credit by reason of his supposed ownership of the property conveyed.
4. The Code of Louisiana gives no effect to an unregistered act of alienation as against *bona fide* purchasers or creditors.
5. But a general creditor of the grantor cannot proceed to set aside a conveyance, either really or constructively fraudulent, unless he has a lien on the property conveyed, or has reduced his claim to judgment.
6. But this rule does not apply to an assignee in bankruptcy. The adjudication of bankruptcy arrests the proceedings of creditors to obtain judgments. The assignee may therefore proceed to impeach a deed of the bankrupt as fraudulent, although the creditors have not reduced their claims to judgment, and although they have no specific lien upon the property conveyed.

Barker vs. Barker's Assignee.

This was a bill in equity, filed in the district court and brought to this court by appeal. The case was submitted to the circuit court upon the pleadings and evidence for final decree.

Mr. John A. Campbell, for complainant.

Mr. A. Micou, for defendant.

Woods, Circuit Judge. The facts of the case are these: On the 30th of September, 1857, Jacob Barker was seized in fee and was in possession of a certain parcel of real estate in the city of New Orleans. On that day, by his deed of that date, he conveyed the real estate to his son, Abraham Barker, the complainant. Although the deed was absolute on its face, yet the conveyance was made to Abraham Barker in trust for Elizabeth Barker, wife of Jacob Barker, and mother of complainant. The consideration, as claimed by complainant, was \$8,000, made up by the cancellation of two notes for \$1,300 each, with interest, made by Jacob Barker and held by Elizabeth Barker, the payee, by the payment by the trustee for Jacob Barker of a balance due Barker Brothers, and a credit for the remainder in favor of Jacob Barker on the books of the trustee.

The deed was not recorded until the 14th of July, 1869. In the meantime, about the year 1861, Mrs. Elizabeth Barker died, having provided by her last will that the whole income of her estate, or so much thereof as might be necessary, and, if required, the principal, or some part thereof, should be devoted to the support of the said Jacob, and such members of the family as might, in his discretion, require it.

Both before and after the death of Mrs. Barker, Jacob Barker collected the rents and paid the taxes upon the property, he being a resident of New Orleans, where the property was situated, and Abraham Barker, the trustee, a resident of Philadelphia.

In June, 1867, Jacob Barker was adjudged a bankrupt by the United States district court of Louisiana, and placed upon his schedules, through inadvertence and mistake, as he testifies, the parcel of real estate conveyed to complainant in 1857, and afterwards it was sold by the assignee to the defendant, Samuel Smith.

Jacob Barker, for many years prior to the date of his deed to

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Abraham Barker, had been a prominent business man and banker in New Orleans, of great reputed wealth, and so continued until the date of his bankruptcy in 1867.

The prayer of the bill is that the sale to Smith may be set aside and the property reconveyed to the complainant, or that he may receive the proceeds of the sale made to Smith.

Samuel Smith, one of the defendants, files an answer, in which he says he is willing to abide by the order of the court in the premises, and if the court shall decide that the sale to him should be annulled, consents thereto on the repayment to him of the purchase money.

The assignee defends against the bill on two grounds:

(1) Because the deed to Abraham Barker was simulated and intended to defraud the creditors of Jacob Barker; and (2). Because the failure to record the deed rendered it null and void; and as the assignee was appointed before the deed was recorded, he can, as the representative of the creditors, insist on the invalidity of the deed. These defenses present the points that demand our attention.

First. Is the deed of September 30, 1857, void because executed in fraud of creditors? There is not a word of evidence in the record to show that in 1857, Jacob Barker had a creditor in the world. On the other hand, all the facts in the case are consistent with the theory that, being a man of large means and independent fortune, in no pecuniary strait, and wishing to put in the hands of a trustee trust property held by him for his wife, he made the deed in question. As all the parties were members of the same family, it was not thought necessary to transact the business with the formality and precision usually employed when the transaction is between strangers. Had it really been the purpose of Jacob Barker to defraud his creditors, he would have been careful to see that the deed was executed and recorded in strict compliance with law. But it is not necessary to argue the question of fraudulent intent against creditors, because there is, as just stated, no proof that there were any creditors when the deed was executed and delivered.

Can those who were not creditors at that time, but who became so years afterwards, complain of the deed as fraudulent? It

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seems clear that generally they cannot. The doctrine established by the supreme court of the United States is, that a voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors on the ground of its being voluntary. It must be shown to have been fraudulent or made with a view to future debts. *Sexton v. Wheaton*, 8 Wheat., 229; *Hinde v. Longworth*, 11 id., 199. See also *Bennett v. Bedford Bank*, 11 Mass., 421.

There is nothing in the record which tends in the slightest degree to show that any of the creditors of Jacob Barker, who are represented by the assignee, were such at the date of the deed to Abraham Barker, nor that the purpose of that conveyance was to defraud any of his present creditors.

If the present creditors have any right to complain, it is not because the deed of 1857 was made in actual fraud of those to whom Jacob Barker was then indebted, but because it was not recorded, and because they have given him credit on the strength of his presumed ownership of the property conveyed thereby.

A deed, not at first fraudulent, may become so by being concealed, because by its concealment, persons may be induced to give credit to the grantor. *Sands v. Hildredth*, 2 Johns. Ch., 35; *Hilderburn v. Brown*, 17 B. Mon., 779.

A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent. *Worseley v. De Mattos*, 1 Burr., 467; *Hungerford v. Earle*, 2 Vern., 261; *Lewkner v. Freeman*, 2 Freem., 236; *Constantine v. Twelves*, 29 Ala., 607.

This brings up the second question, whether the failure to record the deed avoids it as to creditors.

The code of Louisiana gives no effect to acts of alienation as against creditors or *bona fide* purchasers, unless they have been regularly registered. This is conceded; but counsel for complainant says that the creditors, as against whom an unrecorded deed is void, are those only who have obtained a judgment which created a lien or privilege on the land, and not general creditors. Whether the provision of the law is thus limited is the precise question now for solution.

The general rule is, that a creditor cannot proceed to set aside

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a conveyance of real estate, either really or constructively fraudulent, unless he has a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. *Jones v. Green*, 1 Wall., 330; *Coleman v. Crocker*, 1 Ves. Jr., 160; *Brinkerhoof v. Brown*, 4 Johns. Ch., 671.

Conceding that a general creditor having no lien or judgment could not file a bill to set aside as void an unrecorded conveyance of real estate, and to subject the property to the payment of his debt, does this rule apply to an assignee in bankruptcy?

In the case of *Carr v. Hilton*, 1 Curtis, 231, a bill in equity was sustained by an assignee to subject property conveyed by the bankrupt in fraud of his creditors to administration for their benefit. In many other cases this has been done.

It would appear that an adjudication of bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid. If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy to the payment of debts. For after an adjudication of bankruptcy, no creditor whose debt is provable is allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the bankrupt's discharge shall be determined. Bankrupt Act, sec. 21.

The question under consideration was decided by Woodruff, circuit judge (*In re Leland et al.*, *Bankrupts*, 10 Blatch., 507), in the case of an unrecorded mortgage of chattels. The learned judge says: "It is claimed, because the mortgage is valid without being properly filed as against the bankrupts, it is, therefore, good as against their assignee in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity.

"The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them, and whatever right they might assert, if they had ob-

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tained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts which are fraudulent and void as against creditors, or which are otherwise as against them invalid."

The case stands thus: Jacob Barker, in 1857, was seized of the real estate in dispute. He attempted to convey it by a deed which his grantee failed to record, and he remained in possession. This failure to record the deed made it inoperative as against subsequent purchasers and creditors. So far as their rights are involved, the title still remained in Jacob Barker until his bankruptcy in 1867. By the adjudication, the rights of the creditors were vested in the assignee. The want of judgments in their favor is supplied by the adjudication of bankruptcy, which authorizes the assignee to file a bill to subject the property to administration, just as if he were a judgment or lien creditor. But the property has been delivered to him without suit, and its proceeds are in his hands for distribution. If it is rightfully thus, if under the circumstances of this case by his bill in equity, he could have subjected the property, then it follows, his rights are superior to the rights of the grantee of the unrecorded deed to the property, and that the bill of the latter to set up his claim is without equity.

The bill must therefore be dismissed.

APRIL TERM, 1875.

THE UNITED STATES vs. B. E. GAUSSEN, Ex'r.

1. Where the condition of the bond of a collector of customs was that he should faithfully discharge the duties of his office according to law, the law referred to was any law that was on the statute book at the date of the bond, or that might be passed during the collector's term, prescribing the powers and duties of his office.
2. Where the duties and responsibilities of a collector of customs were changed by law subsequent to the execution of his official bond, but the nature and general duties of his office remained the same, the sureties on the bond remained liable.
3. Where duties not required by law to be performed by him were imposed on

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a collector by the superior officers of the treasury department, he was still required to discharge his duties according to law, and the sureties on his official bond were liable for his failure to do so.

4. Delay on the part of the government in enforcing its rights cannot be set up as a defense.

This cause was an action at law against the executor of one of the sureties on the bond of Thomas Barrett, late collector of customs. It was heard upon a motion of plaintiff's counsel to strike out two of the answers of defendant as insufficient in law.

Mr. J. R. Beckwith, U. S. Attorney, for the motion.

Messrs. W. H. Hunt, John Finney and H. C. Miller, contra, cited *De Colyer on Suretyship*, 336; *Pybus v. Gibb*, 88 Com. Law, 910; *Converse v. United States*, 21 How., 463; *United States v. Shoemaker*, 7 Wall., 338; *United States v. Tillotson*, 1 Paine, 305; *United States v. Adm'rs of Hilligas*, 3 Wash., 70.

WOODS, Circuit Judge. This is an action brought on the official bond of Thomas Barrett, late collector of customs for the district of Louisiana against the defendants as executors of John K. Elgee, deceased, who was one of the sureties on the bond.

It appears from the petition that Barrett was appointed collector on the 6th of July, 1844, and made his official bond of that date, in the penalty of one hundred and twenty thousand dollars with John K. Elgee and others, sureties, and conditioned as follows: "Now, therefore, if the said Thomas Barrett has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of said office according to law, then the above obligation to be void; otherwise, it shall abide and remain in full force and virtue."

The breach alleged is that Barrett, the principal, failed to account for and pay over the sum of \$41,376.64, which was found to be due from him to the United States on the 12th day of October, 1845, on a statement of his accounts.

To the petition filed in this action, the defendant has answered, among other pleas, the following in substance:

1. That subsequent to the date of the bond and during Barrett's term of office, the United States exacted from him the per-

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formance of duties and the assumption of responsibilities in regard to the receipt, custody and disbursement of moneys received by him as collector, different and varying from the duties and responsibilities in that regard legally incumbent upon him as collector, by the law in force at the date of the bond.

That during his said term, Barrett was relieved by the United States from the duty and obligation of paying out the public moneys in the mode required by law, and in lieu thereof was required by the United States to expend and disburse a large part of the public moneys received by him in payments to collectors and surveyors of other districts, for the construction of the new marine hospital and for the maintenance of existing hospitals, light houses, revenue vessels, etc., and for other purposes entirely beyond the scope of his duties as collector as fixed and defined by law; that he was required by the United States to receive and disburse, and during his term did receive and disburse under said requirements, large sums of money which he was not required by law to receive and disburse as collector.

That in this manner the risks and responsibilities of Barrett as collector were, without the consent of the sureties, enlarged and changed by the United States subsequent to the execution of the bond; therefore the sureties are discharged.

2. That in 1846, Barrett died, leaving a large estate, more than sufficient to pay the plaintiff's demand; that four other persons who were sureties on said bond have died, leaving large estates; that the United States were entitled to priority of payment out of all said estates for any claim they might have against Barrett on his bond, and that having neglected to enforce the demand for payment out of said estates, it has lost its right against them, and in consequence of this laches the liability of the defendant's testator is discharged.

The plaintiff pursuant to the practice which has been recognized as not improper in this state, now moves to strike out these answers as insufficient in law to bar the plaintiff's right of action.

I shall notice these defenses in their order:

1. When the condition of the bond sued on declares that Barrett "shall truly and faithfully discharge the duties of his office, according to law," it is clear that the law referred to is any law

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that was then on the statute book or that might be passed during the continuance of his term of office, regulating the powers and duties of his office. Otherwise, every increase in the rate of duties, every change in the manner of conducting the office, or rendering accounts or paying out the public money would discharge the bonds of all the collectors of customs holding under the government. The same would hold true of the bonds of the army of internal revenue collectors, postmasters, or other officers who have any duty to discharge in collecting or paying out the public money. The case of *The Postmaster General v. Munger*, 2 Paine, 189, was an action on a postmaster's bond. Acts of congress had been passed subsequent to the giving of the bond increasing the rates of postage, and consequently the responsibility of the sureties. But it was held that as the undertaking of the sureties was general, that all postages should be paid over, and referred to no particular act explaining or limiting the rate of postage, and was not taken under any law defining its extent and operation, the sureties were not discharged.

So in *Boody v. The United States*, 1 W. & M., 150, it was held that the sureties on the bond of a postmaster are liable for his noncompliance with subsequent as well as past laws or orders till his official term expires, if the orders be such as are justified by law.

In *Pybus v. Gibb et al.*, 6 El. & Bl., 903 (88 Eng. Com. Law, 910); the plaintiff being high bailiff of the county court of Northumberland, had appointed Gibb, one of the defendants, his bailiff, and the bond was by the bailiff and the other defendants, his sureties, conditioned to indemnify the high bailiff in respect of the conduct of the bailiff in office. Under color of a warrant against the goods of Edgar, Gibb the bailiff seized the goods of Thew, who recovered against the plaintiff, and the breach assigned was for not indemnifying the plaintiff against this. The plea by the sureties showed that the bond was executed when stat. 9 and 10 Vict., ch. 95, was the act regulating the county court; it alleged that several acts came into operation after the execution of the bond and before the breach complained of. On demurrer to the plea, CAMPBELL, C. J., said: "The question is, whether the nature and functions of the office or

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employment are changed; for if they are, it is not the same office within the meaning of the bond. The condition of the bond was for the due execution by Gibb of his office as bailiff, according to stat. 9 and 10 Vict., ch. 95, not, be it observed, according to such acts of parliament as might be made respecting the office." And the acts passed since the execution of the bond having increased the jurisdiction of the court from £20 to £50, and in cases of consent of parties to any amount, and having conferred bankruptcy jurisdiction, and given power to arrest absconding debtors, the court held that the office of bailiff was substantially changed and the sureties no longer liable.

It will be observed that this decision rested on the language of the bond, limiting the duties to be performed by the bailiff to those prescribed by a particular act, and that if the bond had been made for the due execution of the office according to law generally, the inference from the language of the court is that the bond would have been held good and binding on the sureties. See also *The People v. Vilas*, 36 N. Y., 459.

The answer under consideration sets up three substantial facts as constituting a defense to this action:

1. That the performance of duties and the assumption of responsibilities were exacted of Barrett different from those incumbent on him by the law in force at the date of the bond.

2. That Barrett was excused from the obligation of paying out the public money in the mode required by law, and was required by the United States to disburse a large part of the public moneys received by him in payment, to other collectors, and in the construction of the new marine hospital, etc., and for other purposes beyond the scope of his duties as fixed and defined by law.

3. That he was required to receive and disburse large sums which he was not required by law to receive and disburse as collector.

If the first branch of the answer under consideration means that the duties and responsibilities of Barrett were changed by law, subsequent to the execution of the bond, I am of opinion on the authorities cited, that the sureties on the bond of Barrett were not discharged by any such change, for the reason that the condition of the bond in effect bound him to perform the duties

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of his office according to the law as it existed at the date of the bond, or might be changed by subsequent legislation.

Again, if the meaning of this part of the answer is as just stated, the answer is not good for another reason: the court takes judicial notice of the legislation of congress, and the court judicially knows that during Barrett's term of office there was no legislation of congress which in any way materially changed the duties or responsibilities of his office. But suppose the plea to mean that new duties and responsibilities were imposed upon Barrett during his term of office by his superior in the treasury department: These superior officers imposed these new duties upon Barrett as collector, either with or without the authority of law. If by authority, it follows from the terms of the bond that the defendant is bound; if without, these requirements could not affect his duties as collector. He is still bound to discharge his duties according to law, and if he fails in this, he and his sureties are liable upon his bond. If the officers of the treasury have imposed upon him duties not required of him by his office of collector, neither he nor his sureties are bound for any failure to discharge such duties. But his duties as collector still remain, and he is bound to discharge them, and he and his sureties are liable for his failure to do so. These remarks apply to the first and third branches of the plea.

The second part of the answer alleges that Barrett was excused from paying out the public money in the manner required by law, and was required to disburse it to collectors and surveyors of other districts for the marine hospital, light houses, and for other purposes beyond the scope of his duties as collector.

This part of the answer presents the question whether the disbursement, by a collector, on the authority of the United States, of public money for the payment of collectors and surveyors of other districts for the erection of the marine hospital for light houses and revenue vessels, were payments authorized by the law in force during Barrett's term of office.

During Barrett's term, the act of March 2, 1799, "to regulate the collection of duties on imports and tunnage" (1 Stat., 627,) was in force. Section 21 of this act declares that "the said collector shall at all times pay to the order of the officer who shall

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be authorized to direct the payment thereof, the whole of the moneys which they may respectively receive by virtue of this act." Now it does not appear by the answer under consideration that Barrett was required to pay out, or did pay out, any of the public moneys, except in the manner pointed out in this section. For what purpose they were paid out is entirely immaterial, provided they were paid to the order of the officer who should be authorized to direct the payment.

During Barrett's term of office, there was no law in force establishing an independent treasury for the United States. As soon as public dues were paid to a collector of customs they were, to all intents and purposes, in the treasury, and were subject to the order of the proper officer of the treasury. It is a mistaken idea to suppose that, before the enactment of the independent treasury act, a collector of customs could pay over the public money in his hands in only one way, and that by transmission to the treasury. "The duties of collectors of customs," says the supreme court of the United States, in *Broome v. United States*, 15 How., 157, "have been much multiplied by other acts since the act of 1799 was passed. Scarcely an act, and no general act has been passed since, concerning the collection of duties upon imports and tunnage, without some addition having been made to the collector's duties. They are suggested from experience. The collector too has always been a disbursing officer for the payment of the expenses of his office, and may pay them out of any money in hand, whether received from duties or remittances for that purpose, when the expenses are not unofficial, have been sanctioned by law, and have been incurred by the direction of the secretary of the treasury. For such payments he may credit himself in his general account against the sums which may have been received for duties. He may retain his own salary or fees and commissions; pay the salaries of inspectors and other officers attached to the office; make disbursements for the revenue boats, light house, buoys, etc., and apply money collected for duties to all expenses lawfully incurred by himself or his predecessors." * * It has often been the case, and must be so again, as it is now, that the convenience of the government and the interest of its citizens

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require collection districts to be established which do not and are not expected at first to pay expenses. Remittances then must be made for such purposes. They are made to the collector, because it is under his personal supervision that the work is done or the goods are furnished for the government at the point of his office where the law requires him to reside." See also *Converse v. United States*, 21 How., 463.

I am of opinion therefore that if the averments of the second branch of the answer were true, it would not discharge the bond of Barrett.

My conclusions are as follows:

1. That the collector was bound by the condition of his bond to discharge the duties of his office according to the law as it existed at the date of the bond or might during his term be changed by subsequent legislation.

2. That no change made by law in the rate of duties, the routine of the office, or in the method of conducting it, which did not change materially the character of the office, would discharge the sureties on the official bond of the collector.

3. That there was no legislation during Barrett's term which either changed the nature of his office or duties, or the method of performing his duties.

4. That everything alleged in the answer, as required by the United States to be done by him, was authorized by law at the date of the bond.

As the result of these conclusions, it follows that the answer under consideration is not well pleaded, sets up no good defense to the action, and must be stricken out.

As to the third answer, setting up laches on the part of the plaintiffs in prosecuting their claim, it is sufficient to say: "*Nullum tempus occurrit regi.*"

See *Dow v. P. M. General*, 1 Pet., 318.

The motion to strike out both answers, as insufficient in law, must prevail.

Peterkin vs. The City of New Orleans.

NOVEMBER TERM, 1875.

W. S. PETERKIN vs. THE CITY OF NEW ORLEANS.

1. The taxes and public revenues of a municipal corporation cannot be seized on execution by its creditors, although the corporation is in debt and has no means of payment except the taxes which it is authorized to collect.
2. Neither the place nor manner in which the revenues of a municipal corporation are kept divests them of their public character or subjects them to be diverted, at the suit of creditors, from the purposes for which the law authorized them to be collected.
3. Such revenues are protected from seizure or attachment by creditors, although they may have been deposited in a bank for safe keeping, and the bank has thereby become the debtor of the corporation for the amount so deposited.
4. An act of the legislature required a municipal corporation to levy each year a special tax sufficient to pay the annual interest on certain of its designated bonds: *Held*, that the act authorized and required the levy of a tax to pay interest after the maturity of the bonds as well as before.

Heard on motion to dissolve attachment. The plaintiff being the holder of certain bonds issued by the city of New Orleans in aid of the Opelousas Railroad and of the Jackson Railroad, and the bonds having become due and remaining unpaid, had reduced the same to judgment in this court.

In pursuance, as it is claimed, of the original act which authorized the issue of the bonds, the city had levied a tax to pay the interest thereon, and a fund for this purpose, amounting to \$105,000, had been deposited by the city in the Louisiana National Bank. It was deposited in the bank to the credit of the fund for the payment of the interest on the bonds, but was not sufficient to pay the interest on all the bonds.

The plaintiff having, as stated, recovered a judgment both for the principal and interest due on his bonds, had attached this fund and served notice of garnishment upon the Louisiana National Bank.

The motion was to dissolve this attachment.

Mr. B. F. Jonas, City Attorney, for the motion.

Mr. T. J. Semmes, *contra*.

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Woods, Circuit Judge. It is claimed in behalf of the city that the taxes and public revenues of a municipal corporation cannot be seized under execution against it, and that the doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt and has no means of payment but the taxes which it is authorized to collect. Dillon on Mun. Corp., sec. 64; *Edgerton v. The Third Municipality*, 1 La. An., 435; *Hart v. Same*, 6 id., 571.

This, as a general rule, is conceded; but it is claimed that the circumstances of this case make it an exception.

1. It is said that the city having deposited this money in a bank, the bank has thereby become the debtor of the city, and the fund has lost its distinctive character as public revenue and become simply a debt due the city from the bank, and subject to garnishment by any creditor of the city. In support of this view the cases of *Stetson v. Gurney*, 17 La., 162, and *Norris v. Henry*, 26 La. An., 625, are cited, where it is held that money deposited in a bank by an agent in his own name cannot be identified, and becomes a debt due the depositor from the bank, and is not a debt due the principal.

This argument applies to all the funds of the city raised by taxation for all purposes. So that if we give this theory full force, it follows that whenever a municipal corporation, either from necessity or as a matter of convenience, deposits its revenues in a bank to be drawn upon for public uses, no matter to what purpose appropriated, they are liable to be seized by its creditors; that funds for feeding prisoners, sustaining hospitals, lighting the streets, keeping a supply of water for the extinguishment of fires, paying the police, etc., are all subject to be appropriated by any enterprising creditor who chooses to make the necessary effort. If funds raised for the payment of interest can be seized because the city has deposited them in a bank, it follows that funds raised for any of the other purposes named may also be seized.

I do not think the manner or place in which the public revenues of a municipal corporation are kept divests them of their public character, or subjects them to be diverted from the purposes for which, and for which only, the law authorized them to

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be collected. In my judgment, a municipal corporation stands in a different plight from an individual in such a case. The officers of a city charged with the execution of a great public trust, on which depend the comfort, safety, lives and property of the inhabitants, cannot, by the manner in which they keep the public revenues, subject them to seizure by the public creditors, and thus defeat the very purposes for which the municipal body was created. The fact, therefore, that the city made the Louisiana National Bank the depository of its public revenues, does not subject them to seizure and garnishment.

2. It is claimed that the law authorizing the city to issue the bonds held by plaintiff, only authorized the city to levy a tax to pay the interest thereon until their maturity; that the fund attached was for interest on the bonds after maturity, and is therefore a property of the city which is not applicable by law to any specified purpose, and is therefore subject to seizure by any creditor who has a judgment against the city.

But the law does not so read. It provides that "a special tax on real estate and slaves shall be levied in January of each year sufficient to pay the annual interest on said bonds, * . * provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of 6 per cent. per annum on the stock of the company held by the city." Under this act, the authority to levy a tax for the payment of the interest upon the bonds is just as clear, and the duty just as imperative, after the maturity of the bonds as before, unless the stock for which the bonds were issued pays dividends of 6 per cent., which is not and never has been the case. If the city refused to levy a tax for interest after the maturity of the bonds, I think a bondholder who had reduced his bonds to judgment might have the writ of *mandamus* to compel the city to levy and collect the tax. The collection of the money seized was, therefore, authorized by law. It was collected for a special purpose, and it cannot be diverted from that purpose by the vigilance and enterprise of the city's creditors. The officers of the city could be compelled by *mandamus*, at the instance of creditors having judgments on their bonds, to apply the funds so raised to the payment of interest *pro rata* on all the bonds of this class.

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It therefore follows that no single creditor has the right to seize the whole fund for his sole benefit and apply it to the payment of the principal as well as the interest of his debt.

This fund must be applied to the purpose for which the law authorizes its collection, and no other. The attachment must therefore be dissolved.

SAMUEL B. HUNT and wife vs. ELIZABETH B. INNIS et al.

1. The records in the recorder's office of the parish of Rapides having been destroyed by fire, an act of the legislature was passed providing for reestablishing said records by proceedings before the district judge of the parish. *Held*, that the inscription, in the proper office, of a decree of said judge reestablishing a mortgage, the record of which had been burned, had the same effect as a reinscription of said mortgage.
2. A consent decree made in a case brought to enjoin the enforcement of a mortgage, by which the mortgage was recognized, the rate of interest increased, and the time for the payment of the debt secured thereby extended, and which declared that "this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same," did not have the effect of extinguishing the mortgage, nor was the mortgage merged in the decree.
3. A notarial act executed by the parties holding the legal title to a piece of real estate which recited the execution and recording of a mortgage thereon, and the destruction of the mortgage record by fire, recited the reestablishment thereof according to law, admitted a specified sum to be due on said mortgage, which sum the parties by the notarial act agreed to pay in installments, is itself a mortgage, and its inscription is effectual under the law of Louisiana to preserve its lien for ten years.

Submitted for final decree upon the pleadings and evidence.

Wm. Grant, for complainants.

Thos. Allen Clarke and *Thos. L. Bayne*, for defendants.

Woods, Circuit Judge. This was a bill to foreclose a mortgage executed on the 17th day of October, 1842, on a plantation in Rapides parish, to secure the sum of \$20,000 to be paid in ten equal annual installments, beginning on the first day of January, 1843.

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The mortgage was duly inscribed in the office of the recorder of mortgages for the parish of Rapides, on the day of its date.

In 1851, the mortgagors commenced a suit against the mortgagees, in the Rapides district court, for some relief against a proceeding, by way of seizure and sale, instituted by the mortgagees. In that case a consent order was made, by which it was decreed that the injunction granted in the case be dissolved, and that in lieu of damages on the injunction bond, the defendants recover of the obligors in the bond, the sum of \$1,000; that the mortgage debt due Hunt and wife, as set forth in the order of seizure and sale obtained by them, and the execution whereof had been enjoined in the case, should bear interest at the rate of 8 per cent. per annum from June 2, 1861, the date of the injunction, until payment, instead of five per cent., as allowed in the order of seizure; but the plaintiffs in injunction, Elizabeth B. and John Innis, were to be allowed time for the payment of the mortgage debt and interest as follows, to wit: in five equal annual installments of \$1,853 each, the first payable on the first day of January, 1853, and it was declared "that this decree is not to operate a novation of the original mortgage to Hunt and wife, on which the said order of seizure was obtained, or in any manner affect the validity of the same."

This proceeding and decree, which included a copy of the mortgage, was recorded in the office of the recorder of mortgages on December 5, 1851, and also on April 17, 1861.

In the year 1864, the court house of the parish of Rapides was burned, with the records of the recorder's office, including the original record of this mortgage, and of the decree above mentioned.

On February 28, 1866, an act of the legislature of Louisiana was approved which provided for supplying the loss of the records destroyed in the said fire, by proceedings to be instituted before the district judge of the parish, and by his judgment and decree. The 7th section of this act declared "that the recording in the proper book of the office of the parish recorder, of a copy of the judgment rendered under the provisions of this act, establishing any deed, bond, mortgage, judgment, or other writing, shall have the same force and effect as the recording of the

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original deed, bond, mortgage, judgment, or other writing which was destroyed.”

Pursuant to this statute, a proceeding was instituted before the judge of the district court for the parish of Rapides, to establish the said mortgage, and the said consent decree of 1851, and on June 22, 1866, a decree was rendered by said judge recognizing, establishing, and confirming the mortgage of 1842, the decree of 1851, and the reinscription of said mortgage and judgment made in the recorder's office in 1861, and declaring that they have the same force and effect as when stipulated, granted, confirmed and reinscribed.

The mortgage and judgment so established were recorded in the office of the parish recorder of mortgages on July 1, 1866.

The controversy in the case is between the mortgagees named in the mortgage of 1842, the complainants, and certain defendants, who have obtained judgments against the mortgagors, which were recorded in the office of the recorder of mortgages for the parish of Rapides, on the 12th of March, 1868.

These judgment creditors have answered and have filed a cross-bill in which they claim that their recorded judgments are the first lien upon the property, and that in fact the complainants have no lien whatever, either as against the mortgagors or any one else.

They base this claim on two grounds:

1. That admitting the reinscription of the mortgage of complainants in 1861, it has never since that year been reinscribed, and as the ten years allowed for reinscription expired in 1871, under the jurisprudence of this state, the mortgage has become of no effect even as against the mortgagors, and of course is invalid as against any one else.

The claim is that the record of the proceedings and decree of the district court of the parish of Rapides, which contains a copy of the mortgage and the decree of 1851, and the order of the court establishing the same, does not avail as a reinscription. I think this claim is untenable. The district court for the parish of Rapides reestablished the mortgage *in hæc verba*, and this decree, containing an accurate copy of the mortgage as found by that court, was in September, 1866, recorded in the office of the

recorder of mortgages for the parish of Rapides. Now the claim is that the decree of the court and this registration of its decree only put the parties in the same position as if there had been no destruction of the records by fire; that the ten years within which the reinscription had to be made commenced to run in 1861, and this term was not interrupted by the registration of the copy of the mortgage and decree of the court establishing it in 1866.

But it seems to me that section 7 of the act to establish the burnt records already quoted does give effect to the record of a reestablished deed, bond, mortgage, judgment, or other writing, as of a reinscription. It says that the recording in the proper office of any of the documents named shall have the same force and effect as the recording of the original. The recording of the original mortgage would give it effect for ten years. So if we give force to the words of this statute, the recording of the established copy has the same effect.

In my judgment, the registration of an established copy would accomplish all the purposes of a reinscription of a mortgage. The object of a reinscription is to give notice to all, that the mortgage debt is not yet paid and that the mortgagee insists on his lien upon the mortgaged premises. This reinscription must be made every ten years. Now does not the registration of a reestablished mortgage, under the act of February 28, 1866, give notice that the mortgage is not paid and that the mortgagee insists upon his lien? It seems to me that the registration of the reestablished deed is a compliance with the letter as well as spirit of the registration law of this state.

The law does not require a vain and useless thing to be done. A mortgagee can reinscribe his mortgage as often as he pleases; every year if he so elects. Now what end could be subserved by requiring this mortgage, in case he desired to reinscribe his mortgage on the day when he had the reestablished record recorded, to have the same record again recorded in the same book, in the same office, and on the same day? Yet if he had done that, I infer that the defendants could not claim that such reinscription was not good for ten years. In my judgment, two reinscriptions on the same day and upon the same record book are unnecessary and one has all the effect of two.

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I hold therefore that the complainants have not lost their lien from any failure to reinscribe.

The defendants insist,

2. That the mortgage of complainants was merged in the judgment rendered in 1851, and that unless this judgment was revived within ten years, it became void and of no effect; that no revivor ever took place, and that consequently the lien of the judgment is lost, and that in fact the judgment itself is invalid. This claim is based on the idea that the mortgage was merged in the judgment. But a reference to the decree of the court shows that this was not so.

This judgment, which was in fact only a compromise between the parties entered of record, simply extended the time for the payment of the mortgage debt, and increased the rate of interest which the debt was to bear. It then explicitly declares, that this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same. This language is entirely inconsistent with the idea of a merger of the mortgage in the decree. No suit could be maintained on this decree without setting out the original mortgage. In my judgment, the mortgage remained in full force and effect notwithstanding this decree, and no revivor of the decree was necessary. The mortgage of itself preserved the lien.

But it seems to me that a complete answer to the claim of defendants, that they have the first lien upon the mortgaged premises, is found in a fact yet to be stated. This is, that on the 11th day of September, 1866, Eliza B. Innis, O. A. Innis, Cornelius Innis and John Innis, the parties then holding the legal title to the mortgaged premises, with the consent and concurrence of the mortgagee, executed in due form a notarial act in which they recited the execution of the original mortgage, described with precision the mortgaged premises, recited the destruction of the record of the mortgage by fire in 1864, and the establishment of the record thereof by the district judge of Rapides parish, as hereinbefore set forth, admitted the balance due on said mortgage to be \$13,336.28, with interest at eight per cent. per annum, and agreed to pay said sum in installments as in said act set forth.

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This act does not profess to convey the mortgaged property, but to be a confirmation of the conveyance by the mortgage of 1842. It seems to me, that to all intents and purposes, this act is itself a mortgage, and as it was recorded in the proper office on September 13, 1866, it is still in full force and effect.

ROSALIE MAENHAUT et al. vs. THE CITY OF NEW ORLEANS et al.

1. An act of the legislature, which provided for the issue of bonds by a municipal corporation, and prescribed the manner in which the tax to pay the interest thereon should be levied, and enacted safeguards to secure its levy and collection, on the faith of which legislation the bonds were sold, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact.
2. Money collected to pay the interest on said bonds, levied, collected and set apart, according to the provisions of said act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders.
3. The act of the legislature of Louisiana of February 23, 1852, establishing the charter of the city of New Orleans, which declares that the rate per cent. of the tax (to pay interest on the consolidated debt) in each municipality shall be in proportion to the indebtedness of each, is not in conflict with article CXXVII of the constitution of 1845, which declares that "taxation shall be equal and uniform throughout the state."

IN EQUITY.

This cause was heard upon the motion of complainants for a preliminary injunction, and for the appointment of a receiver. It was submitted upon the bill, supplemental bill, answer, affidavits, and arguments of counsel.

Messrs. John A. Campbell and E. Bermudez, for the motion.

Messrs. B. F. Jonas, City Attorney, T. J. Semmes, W. W. Howe, John Finney and E. W. Huntingdon, contra.

Woods, Circuit judge. The facts as they appear from the pleadings and affidavits are substantially as follows: Previous to the 23d of February, 1852, the city of New Orleans was composed of one general municipal organization, which comprised

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municipalities, each of which had a government of its own, and each of which, as well as the general municipal body, had contracted debts for which they were respectively liable. At the date named, an act of the general assembly of Louisiana was approved, which established a municipal corporation to be called the city of New Orleans, to be composed of the several municipalities, and to be governed by a mayor and common council. The act declared that the estate and title of the several municipalities in lands, bridges, ferries, streets, roads, wharves, markets, stalls, landing places, buildings and other property, should be vested in the city of New Orleans.

Section 37 of this act provided that the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities should be assumed and paid by the city of New Orleans, and the city was declared liable therefor. Five officers of the city, including the mayor, were constituted commissioners of the consolidated debt of New Orleans, and they were authorized to issue the bonds of the city, having not more than forty years to run, with interest payable semiannually. The commissioners were authorized to exchange these bonds for any bonds, obligations or debts of the old corporation, or any of the municipalities, or to sell the same, and with the proceeds pay off said debts. It was provided that the bonds thus issued should form a stock to be called the consolidated debt of New Orleans.

It was further provided as follows: "The common council shall annually, in the month of January, pass an ordinance to raise the sum of \$600,000, by a special tax on real estate and slaves, to be called the consolidated loan tax, and the rate per cent. of said tax in each municipality shall be in proportion to the debt of each. All ordinances, resolutions or other acts passed by said council after the first day of January in each year, shall be null and void, unless the ordinance imposing the consolidation loan tax shall have been previously passed. At the end of each and every year, any surplus of the consolidated loan tax remaining in the treasury, after the payment of all the interest, shall be applied to the purchase, from the lowest bidder, of such bonds issued under this act as have the shortest period to run."

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The section further provides: "Nor shall any loan be contracted unless the same be authorized by a vote of a majority of the qualified voters of said city, and no ordinance creating a debt or loan shall be valid unless for some single object or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted." By an act passed on the same day as the act just mentioned, the amount to be levied in January of each year to pay the principal and interest on said bonds was increased to \$650,000.

Under authority of these acts, and upon the faith thereof, about ten millions of bonds were issued, which were negotiated above par, and sold in the money markets of Europe and the United States.

It further appears that, beginning with the year 1869, the city of New Orleans had issued several series of bonds in violation of the restrictions imposed by the act of 1852. At the extra session of 1870, an act was passed changing the form of the city government, and repealing the act of 1852, retaining in force, however, some of its clauses and sections.

In 1874 the act No. 53 was passed, which postponed the levy and collection of any tax for the sinking fund for the purchase of the bonds of the city, until December, 1876.

There are now outstanding about \$4,142,000 of the consolidated bonds.

It appears further, by the averments of the supplemental bill, that on the 14th of July, 1875, the city of New Orleans adopted an ordinance, No. 3190, whereby it was provided that the commissioners of the consolidated debt were authorized to pay, with a delay not exceeding ten days, fifty per cent. of the certain past due interest coupons, and that such *pro rata* payments be continued out of all interest collections up to January, 1876, provided that the holders of such coupons shall indicate their acceptance of this arrangement by their respective signatures at the time of payment. The said coupons were to be stamped thus: "Half paid." The following are the coupons referred to:

Consolidated 1852, due July, 1875. Railroad, up to July, 1875. Pontchartrain Railroad, due July, 1875, etc.

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The paper to be signed by the bondholders under this ordinance is as follows: "We, the undersigned, holders of city bonds, hereby acquiesce in and approve ordinance No. 3190 of the city council, providing for the payment of fifty per cent. of the interest collected and to be collected up to the 1st of January, 1876, the balance to be used for the general relief of the city government, reserving our right to be hereafter paid by the city the balance due on said coupons."

The supplemental bill charges that the city council, since the passage of the ordinance aforesaid, has allowed no bondholder to participate in the payments of interest who did not consent to the ordinance, and that it has excluded a number, among whom were complainants, because they would not do so. The complainants are the holders of seven of the consolidated bonds of the city.

There has been deposited by the city in the Louisiana National Bank, to the credit of the consolidated loan, during the six months ending July 30, 1875, the sum of \$174,409.90, and there is now on deposit in the bank to the credit of that fund, a sum nearly, if not quite, sufficient to pay the interest due on the consolidated bonds.

There are many other averments and admissions of the pleadings and matters of fact set forth in the affidavits, which for the purposes of the present motion it is unnecessary to notice.

Although the prayer of the bill of complaint is very broad, the purpose of the present motion is very narrow. It is that an injunction may issue against the city and against the Louisiana National Bank, to restrain them from paying out the said funds collected for the interest on the consolidated bonds, for any other purpose than that for which said fund was collected, or in any other manner than in accordance with the laws and ordinances previously existing, and that should there be any further default, the complainants may be allowed to renew their motion for the appointment of a receiver.

Counsel for defendant, not being advised within what narrow limits the relief sought by this motion was confined, have argued many questions which it is not now necessary to pass upon or notice. The only question is, Shall the injunction go as moved for?

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There can be no serious question that so much of the 29th section of the act of 1852 as provides for the manner in which the tax to pay the consolidated bonds is to be levied, and the safeguards for the levy and collection of the tax, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact. 1 Dill. on Mun. Corp., sec. 41; *Woodruff v. Trapnall*, 10 How., 190; *Curran v. Arkansas*, 15 id., 304; *Van Hoffman v. The City of Quincy*, 4 Wall., 535; *Furman v. Nichol*, 8 id., 44; *People v. Woods*, 7 Cal., 579; *People v. Bond*, 10 id., 563; *Brooklyn Park Company v. Armstrong*, 45 N. Y., 234.

For the purposes of this motion, it is immaterial whether the contract is a contract with the state of Louisiana or with the city of New Orleans. In the case of *Van Hoffman v. The City of Quincy*, *supra*, it was held, however, by the supreme court of the United States, that under like circumstances, both the state and the corporation were bound.

It is also unnecessary to consider whether or not some of the relief prayed for by the bill must be sought by *mandamus* after judgment, and not by bill in equity.

The only question which the court is now called on to decide, is this: The city of New Orleans having collected and set apart, as required by the act of 1852, a fund to pay the interest on the consolidated bonds, can the city be enjoined from appropriating the fund to any other purpose, without the consent of the bondholders?

In my judgment, there is no doubt that the city can be thus enjoined. The money specially collected to pay this interest is deposited in bank to the credit of the fund for that purpose. This money, being the fruits of a contract between the bondholders and the state and city, and having been specially collected under authority of law to pay this interest, and deposited in bank to the credit of a fund set apart for such payment, it is held by the city in a fiduciary capacity, and the trust is imposed upon the city to apply the funds to the object for which they were collected. See authorities cited below. This is a trust which equity can enforce.

DN.LON, in his learned work on Municipal Corporations, says,

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in section 729: "In respect of property held by municipal corporations in trust or clothed with public duties, equity has always asserted its jurisdiction to see that the trusts were performed and the public duties discharged. The jurisdiction of chancery over such municipal corporations is forcibly asserted by the house of lords in an interesting and important case, in which the corporation of Dublin, under act of parliament was the trustee of funds raised from water rates to supply the city with water, and where the bill charging the corporation with breaches of trust and mismanagement was filed by the attorney general on behalf of the inhabitants of Dublin paying water rates." This was the case of *Attorney General v. Dublin*, 1 Bligh (N. S.), 312.

In the case of *The People v. Ingersoll*, 58 N. Y., 35, it was held that if the public corporation, having power to act in a corporate capacity, has by its officers so acted under the laws as to become bound by its obligations, the debt has become a corporate and county charge, and the moneys, the fruits and proceeds of the obligation are trust funds, subject to the control of the governing body of the corporation under the general laws of the state.

So it was held in the case of *Attorney General v. Litchfield*, 11 Beav., 120, that the borough fund created under the municipal corporation act is a trust fund, and the court of chancery has authority and jurisdiction to compel the parties who receive and apply the fund to account for the sums they receive and the application of them, and that the court has jurisdiction, if it be expedient and the case require it, to restrain the application of money collected by rates to costs, debts and expenses incurred prior to making the rates.

The case of *Trevillian v. The Mayor of Exeter*, 5 DeG., M. & G., 828, was this: A corporation raised money under an act of parliament on mortgages of the tolls and additional works of a canal, and acting on what the court of appeal (differing from the court below) decided to be an erroneous construction of the act, applied part of the money so raised in paying off old mortgages affecting other property of the corporation. On the tolls and additional works being an insufficient

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security, held that the new mortgagees were entitled to follow their money so far as it had been erroneously applied, and to stand in place of the old paid off mortgagees as against the other property of the corporation.

So in *Attorney General v. Dublin*, *supra*, it was held that where there is any fund created for the purpose of being applied to some public purpose, which fund is vested in a corporation, the court of chancery has, by its original inherent jurisdiction, a right to see to the due application of the fund.

The court of chancery will always lay hold of any breach of trust in relation to the administration of property, let the party guilty of it be either in a public or private capacity. *Charitable Corporation v. Sutton*, 2 Atk., 406; see also *Attorney General v. Eastlake*, 21 Eng. Law and Eq., 43; *Sturge v. Eastern Railway Co.*, 7 DeG., M. & G., 158.

On these and many other authorities that might be cited, I feel justified in holding that the tax collected and deposited under the act of 1852, to pay the interest on the consolidated bonds, is a trust fund in the hands of the city authorities to be applied to that purpose and no other, and that, if there is any danger that the fund will be diverted to other purposes, the complainants are entitled to their injunction to restrain such diversion.

On consideration of the pleadings and affidavits in this case, I cannot shut my eyes to the fact that there is danger of the application of this fund to purposes other than that for which the law authorized it to be collected.

It seems, however, that some of the holders of the consolidated bonds have consented to receive half the interest on their bonds, and to allow the city to use the other half for other purposes. It is their right to make this agreement, and the court will not interfere with it. The city ought to be restrained only from diverting so much of the fund as may be necessary to pay the interest on the bonds, the holders of which do not consent to the terms of ordinance No. 3190, administration series. A preliminary injunction must issue accordingly. It will be also ordered that should there be any further default, the complainants may renew their motion for a receiver.

In the argument upon the motion for injunction, it was claimed

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by counsel for the city that the act of 1852 was in violation of the constitution of 1845, which was in force when that act was passed, and which declared (art. CXXVII) "that taxation shall be equal and uniform throughout the state." The provision of this act of 1852, which is deemed to contravene this constitutional requirement, is this: "The rate per cent. of said tax (tax to pay interest on consolidated debt) in each municipality shall be in proportion to the indebtedness of each." I cannot see any conflict between the law and the constitution. As at present advised, I do not think the objection to the law well founded.

MILTENBERGER and NORTON, Assignees, vs. EDWARD PHILLIPS.

A suit brought by the assignees in bankruptcy of a bank, to recover money paid as counsel fees by persons acting without authority, as commissioners for the liquidation of the bank under the state law, is barred unless brought within two years from the time the cause of action therefor accrued in favor of the assignees.

Heard upon peremptory exception to the plaintiff's petition.

Mr. Thomas Hunton, for plaintiffs.

Mr. Edward Phillips, in *pro. per.*

Woods, Circuit Judge. The petition was filed on the 2d of April, 1875, and alleges that on the 2d of June, 1871, the plaintiffs were appointed assignees in bankruptcy of the Bank of Louisiana, and were thereby entitled to possess and administer all the assets which were of the bank on the date of the filing of the petition in bankruptcy, which was on the 20th of May, 1869.

The petition further alleges that on and before the 20th of April, 1870, the defendant received, as counsel fees, various sums of money, amounting in the aggregate to a large sum, which were assets of the bank, and were paid to him by certain persons pretending to act as commissioners of the bank, under authority of a court of the state of Louisiana, but in fact without any authority whatever.

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The purpose of the suit is to recover back the sums so paid to Phillips, as having been illegally paid.

The defendant Phillips excepts peremptorily to the petition, among other grounds, because the action is barred by the two years limitation provided in sec. 5057, Revised Code, which declares that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to, or vested in such assignees, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The money sued for was received by the defendant before the assignees were appointed, and more than two years transpired between this appointment and the bringing of this action.

Therefore, if the section just quoted applies to cases like this, the action is barred.

In my judgment it does apply, not only in terms but in spirit.

In a recent case decided by the supreme court of the United States, *Bailey, Assignee, v. Glover*, 21 Wall., 342, it was held that the section under consideration was "a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignees and other persons touching the property or rights of property transferable to or vested in the assignee where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee."

This authority, it seems to me, is decisive of this case. See also *Norton, Assignee, v. De la Villebeauve*, 1 Woods, 163. This action is barred, and cannot be maintained, and the exception setting up the bar is sustained.

It is unnecessary to notice the other grounds of exception.

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ROBERT N. LEWIS vs. GEORGE A. SMYTHE.

1. The trial before which application must be made for the removal of a case from the state to the federal court, in order to warrant such removal under section 3 of the act of March 3, 1875 (18 Stat., 470), is such a trial upon either the law or facts of the case, or both, as settles and concludes the controversy between the parties.
2. When such a trial has been commenced, though not concluded, the application for removal comes too late.

IN EQUITY.

The bill stated, in substance, that the defendant G. A. Smythe, a citizen of Mississippi, brought an action against the complainant Lewis, a citizen of Louisiana, in the fourth district court of the parish of Orleans, on the 28th of November, 1874, to recover the sum of \$3,518. Lewis, desiring to remove the cause to this court, by virtue of the provisions of the act of congress, approved March 3, 1875 (18 Stat., 470, secs. 2 and 3), on the 2d day of July, 1875, filed his petition and bond for that purpose in said fourth district court, as required by the statute. The court refused to permit the case to be removed or to grant an order of removal. Nevertheless, Lewis procured a copy of the record of the case so far as it had progressed, and on the first day of November, 1875, filed the same in this court. The fourth district court after this proceeded with the case and afterwards rendered judgment in favor of Smythe, against Lewis, for \$3,800. On this judgment, Smythe, it is alleged, threatened and intended to issue execution, and the bill averred that the property of Lewis would be seized by virtue thereof, to his great and irreparable injury. The prayer of the bill was, that Smythe might be restrained from proceeding to enforce the judgment. The theory of complainant was, that after the filing of the petition and bond for removal, the case was thereby removed, and the fourth district court had no further jurisdiction of the case, and its judgment was a nullity.

The case came on for hearing upon the motion for the allowance of an injunction as prayed in the bill.

The defendant resisted the injunction, claiming that the case

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had never been removed to this court, but that the fourth district court remained in possession of the case till the rendition of the judgment. The ground of this claim was that the trial of the suit had commenced in the fourth district court before any attempt made to remove the case to this court. That this was the fact is shown by the record filed in this court, as appears by the following extracts therefrom: "May 21st. This case came on this day for trial. * * When, after hearing the pleadings and evidence, the hour of adjournment having arrived, it is ordered that this case be continued to May 31st, at 10 o'clock A. M., for argument. May 31st. This case came on this day for argument, when by agreement of counsel it is ordered by the court that this case be continued indefinitely, to be fixed on motion."

It was after this that the petition was filed for removal.

Messrs. Samuel R. and C. L. Walker, for complainant.

Messrs. G. A. Breaux and Charles E. Fenner, for defendant.

WOODS, Circuit Judge. The act of congress, prescribing how causes may be removed from the state to the federal courts (18 Stat., 470), declares: Sec. 3. That "whenever either party or any one or more of the plaintiffs or defendants, entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court, before or at the term at which said cause could be first tried, and before the trial thereof for the removal of such suit into the circuit court."

By the word "trial," as used in this statute, I do not understand the argument, investigation or decision of a question of law merely, unless it is decisive of the case, and the decision results in a final judgment or decree. The decision of the court on a demurrer, for instance, or on exceptions to the sufficiency of a plea, which is followed by amendments or new pleadings, and which does not end the case, is not the trial meant by the statute.

Blackstone defines a trial to be "the examination of the matter of fact in issue in a cause." 4 Black. Com., 322. See also 2 Hale P. C., 216, ch. 28.

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"A trial has been held to be the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." *United States v. Curtis*, 4 Mason, 232.

So in Stephen on Pleading, appendix, note 29, it is said: "The word 'trial' has long been used to express the investigation and decision of fact only."

No argument or decision of questions merely preliminary, or questions of pleading, except such as settle and end the case (as where the facts are admitted and the case turns upon the law as applied to the facts) is meant by the word "trial." It involves the facts of the case, and whenever the investigation of the facts of a case simply, or the facts in connection with the law is entered upon by the court alone, or by the court and jury, the trial may be said to have begun.

It seems to me too clear to admit of argument that the petition for removal must be filed before the trial commences. The filing of such a petition during the trial, while it is in progress, is not a filing before the trial. To hold otherwise, would be to allow a party to experiment with the court, by going into the trial, and if the rulings of the court were not favorable or the prospects for a propitious result good, to interrupt the proceedings by a transfer of the cause to another forum. Some cases occupy several weeks in their trial. It could hardly be in the contemplation of the act of congress to allow a party, after he has occupied the attention of the court or the court and jury for days, and it may be weeks, with the trial of a cause, to interrupt the proceedings by a transfer of the cause to another court. And yet this would be the effect of the construction claimed by counsel for complainants, namely, that the words "before the trial thereof" mean before the trial is completed and ended.

In my judgment, the petition and bond for removal must be filed "before or at the term at which the cause could be first tried, and before the trial thereof" commences.

As the petition and bond for the removal of this case were not filed until after the parties had entered upon the trial, and until after the pleadings had been read and the evidence submitted to the court, they were not filed in compliance with the statute, and

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they were not effectual to remove the case out of the state court, or to interfere with its jurisdiction to proceed therewith. The judgment of the state court is therefore valid until reversed in a direct proceeding. The motion for the injunction must be overruled.

Whether, if the case had been properly removed, this court could grant the relief prayed by the bill, I will not now undertake to decide.

HENRY ELLERMAN VS. THE NEW ORLEANS, MOBILE AND TEXAS
RAILROAD COMPANY, and others.

1. In a case which can be removed from the state to a federal court under the act of congress of March 3, 1875, the timely presentation of the petition and bond for removal is effectual to suspend all the powers of the state court in which the suit is pending.
2. An appeal does not lie to an order of a state court for the removal of a cause to a federal court, and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal.
3. The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with the plaintiffs, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue.
4. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property.

IN EQUITY.

This cause was commenced on the 11th of September, 1875, in the superior district court for the parish of Orleans. It appears from the petition, that on the 29th day of June, 1875, the city of New Orleans, by contract of that date, transferred to the

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plaintiff all the revenues to be derived from the wharfage and levee dues, belonging to the city of New Orleans. The plaintiff claims that by virtue of said contract, he was subrogated to all the rights and privileges of the city in relation to the collection and receipt of said revenues. By virtue of the ordinance which authorized said contract, a certain amount of wharfage and levee dues was assessed against every vessel using wharfs, according to her size and capacity, to which sum plaintiff claimed to be entitled.

The defendant railroad company had taken possession of the wharves and levee on the Mississippi river in front of the city of New Orleans for the distance of three hundred and fifty feet immediately below Calliope street, and claimed the right to collect wharfage and levee dues from vessels landing or mooring at the said wharf, whether said vessels were connected with the business of the railroad company or not, and had actually contracted with certain lines of steamers in no way concerned with the business of said railroad company to allow them to land at said levee for a certain amount of wharfage to be paid.

The railroad company claimed this right to collect wharfage from all vessels using its wharf, by virtue of the fact that it was the riparian proprietor of the said three hundred and fifty feet next below Calliope street, and by virtue of a joint resolution of the legislature of the state of Louisiana, approved March 6, 1869.

This resolution gave the railroad company the right to inclose and occupy for its purposes and uses that portion of the levee batture and wharf in front of the riparian property which the company owned, and exempted from the payment of wharfage and levee dues vessels, etc., landing at said wharf with the consent of the company, and imposed the obligation upon the company to keep said wharf in repair.

The plaintiff claimed that the city of New Orleans had a vested right in the wharves and levees, and in the revenues derived therefrom, which had been transferred to him by the contract aforesaid.

He therefore brought his suit against the defendant railroad company, and against the city of New Orleans, and in his petition, set forth the facts above stated, and prayed for an injunction

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restraining the railroad company from granting permission to any steamships or vessels to land or moor at the wharves or levees aforesaid, except such vessels as were immediately connected with the business of said railroad company, and further, that said company be prohibited from collecting wharfage or levee dues upon any vessels landing at said wharf.

On September 11, 1875, the injunction prayed for was allowed. Soon after, the railroad company filed its exception to the petition, in which it was alleged that at the date of filing of the petition, and at the date of the said contract of the plaintiff with the city of New Orleans, and at the date of filing the exception it had not, and has not now any control, occupation, management, or power over the wharf property mentioned in the petition, wherefore the suit ought not to be maintained against the said company, but ought to be dismissed. In support of this exception, the defendant company answered, that it was an Alabama corporation; that on January 1, 1869, it had conveyed all its property to trustees to secure the payment of 4,000 bonds of \$1,000 each; that upon default in payment of interest, the trustees took possession of all the defendant company's property, including the said wharves, as they were authorized to do by said deed of conveyance, and they were afterwards appointed by the United States circuit court for the district of Louisiana, trustees and receivers of said railroad company's property, and were required to administer and manage the same to the exclusion of the defendant railroad company.

After the filing of their answer, a supplemental petition was filed, in which it was alleged that J. M. Witherspoon and A. K. Roberts did cause and direct vessels to be landed at the wharves aforesaid, and the same relief was prayed against them as against the railroad company.

These persons having been served with process, filed their answer, in which they disclaimed any right or interest in the wharf property, and alleged that they acted in the premises under a license from the said trustees, Edwin D. Morgan and James A. Raynor, who had title and were in possession of said property under the orders of the United States circuit court. And they prayed to be discharged from the case after citation to the said

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trustees, Morgan and Raynor, whom they called in warranty to come into court and assume the defense of the same.

Morgan and Raynor were then cited, and filed their answer, admitting they were in possession of said wharf, admitting that they had allowed the vessels mentioned in the petition to lie at said wharf, and to receive and discharge cargo, and claimed to have the right so to do by virtue of the joint resolution above mentioned, and of their estate as riparian proprietors.

Afterwards the plaintiff filed another supplemental petition, whereby he made Morgan and Raynor, trustees, parties defendant to the action, and they were enjoined in the same terms as the railroad company had been.

After all these proceedings, the said trustees, Morgan and Raynor, and the railroad company, filed their petition for a removal of the cause from the state court, in which it was pending, to this court. The petition stated that Morgan and Raynor were citizens of New York, and the railroad company a citizen of the state of Alabama, and that Henry Ellerman, the plaintiff, was a citizen of the state of Louisiana, and that the controversy between the plaintiff and said petitioners, the defendants, could be fully determined without the presence of any other party to the suit.

The petitioners for removal at the same time filed the bond required by the act of congress, and the court in which the cause was pending made an order for its removal to this court.

From this order of removal the plaintiff Ellerman took what is called a suspensive appeal to the supreme court of the state of Louisiana, the effect of which he claimed was to supersede the order of removal, until the appeal had been heard and determined by the appellate court.

Notwithstanding the appeal, the defendants filed the record of the case in this court as required by the statute, and moved to dissolve the injunction allowed by the state court.

Mr. John A. Campbell, for the motion.

Mr. W. W. King, *contra*.

Woods, Circuit Judge. The counsel for Ellerman, the plaintiff, as one reason why this court should not dissolve the injunction

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issued by the state court, says that the case has not been in fact removed to this court, and therefore we are without jurisdiction to entertain the motion. This preliminary question must therefore be first disposed of.

The first reason assigned by counsel for plaintiff why the case is not properly before this court is, because an order for removal was necessary to be made by the state court, and being made, was superseded by the suspensive appeal to the supreme court of the state. There is nothing in the acts of congress of the United States on the subject of the removal of suits from the state courts to the United States courts, to give support to the idea that the United States court is dependent upon the state supreme court for a judgment or an opinion on the order of removal. The presentation of a proper petition and bond is, by the acts of congress, as well as by the decisions of the supreme court of the United States, effectual to suspend all the powers of the state court in which the suit is. The acts of congress have no reference to the appellate court. Under the act of 1789 (1 Stat., 79, sec. 12), the application to remove was to be made at the appearance term; by the act of March 3, 1875 (18 Stat., 470, sec. 3), the application may be made at the term at which the cause could be first tried, and before trial. The state court is required to proceed no further when the affidavit and bond have been made and filed. The allowance of an appeal is not a compliance with the act of congress.

It is true, a number of the state courts have adopted a different rule. *State ex rel. Coons v. The Judge*, 23 La. An., 29; *Bryant v. Rich*, 106 Mass., 180; *Whiton v. The C. & N. W. Railway Co.*, 25 Wis., 424; *Darst v. Bates et al.*, 51 Ill., 439. But in considering the cases in the reports of the supreme court of the United States, I am unable to find anything to support the practice. In the case of *Insurance Company v. Dunn*, 19 Wall., 214, it was held that after petition had been filed and bond given for the removal of a cause to the federal court, no power of action thereafter remained to the state court, and that every question necessarily including that of its own jurisdiction must be decided in the federal court. In a still later case the same court says that "the suitor making the application has an un-

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qualified and unrestrained right to a removal, on complying with the requirements of the act of congress." *Insurance Company v. Morse*, 20 Wall., 445. See also *Kanouse v. Martin*, 15 How., 198; *Gordon v. Longest*, 16 Pet., 97.

The New York courts have decided that an appeal does not lie to an order of removal from the inferior to the superior courts of the state. *Stephens v. Phœnix Insurance Company*, 41 N. Y., 149; *Bell v. Dix*, 49 id., 232. See also *Matthews v. Lyell*, 6 McLean, 13.

It is probable that the practice of allowing an appeal arose out of the silence of the statutes in respect to the method of making a removal and of enforcing the order. The early acts provided: 1st, for an affidavit from the applicant, showing his right to remove; 2d, a bond to secure a return of the record to the court of the United States. This being done, the statute declared the effect. This was that the state court should proceed no further. One would suppose this was clear enough, but it was not. The act of March, 1875 (18 Stat., 470) is more explicit: 1st, the same affidavit is required; 2d, the condition of the bond is materially enlarged; it provides for the payment of costs and damages in case the suit is improperly removed; 3d, it gives a power to the circuit court to remand the case, which resulted before only by construction; 4th, it compels the clerk of the court to furnish a copy of the record, by a penal section in the act (sec. 7); 5th, it empowers the circuit court to send a *certiorari* to the state court to obtain it (sec. 7).

The writ of *certiorari* is a very ancient writ of the common law. In the *Natura Brevium* it is described as the writ whereby to remove records out of one court to another. Fitz N. B., 554, A.; 2 Comyn's Dig. tit. *Certiorari*, 332.

The mandatory part of the writ is: "We command you that you send the record and proceedings aforesaid, with all things touching them, to us under your seal, distinctly and openly, and this writ, so that having inspected the record and proceedings, we may cause further to be done thereupon," etc.

Clearly, an appeal to the state supreme court would be no proper return to this writ, nor stay action in this court. The case of *Insurance Co. v. Morse*. 20 Wall., *supra*, establishes this.

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The fact that the railroad company was required to keep an agent in this state, upon whom process might be served, does not prevent a removal of the case to this court. *Norton v. Mutual Insurance Company*, 105 Mass., 141.

I am therefore of opinion that the suspensive appeal taken from the order of removal was not effectual to prevent the removal of the case to this court.

The next reason given why the cause has not been effectually removed is, because this court has not jurisdiction over the necessary parties.

This idea is based on what is called the call in warranty, by Witherspoon and Roberts on Morgan and Raynor. Witherspoon and Roberts are citizens of Louisiana, and, as according to the law of Louisiana (Acts of 1868, p. 28, sec. 1, ch. 12), the trial of the case as against Morgan and Raynor, the persons called in warranty, cannot be separated from the trial against Witherspoon and Roberts, it is claimed that the jurisdiction of this court is ousted—in other words, that Witherspoon and Roberts are parties to the controversy in this court, and, being citizens of the same state as plaintiff, the court is without jurisdiction.

It is a sufficient reply to this to refer to the act of March 3, 1875, sec. 2, *supra*, which declares that “when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district.”

This case falls within this provision of the statute, and the law of the United States, and not of the state of Louisiana, must control. This court may try the case as between Ellerman, plaintiff, on the one hand, and Morgan and Raynor and the railroad company, on the other, and leave the state court to take such action as it may be advised as to the case between Ellerman, and Witherspoon and Roberts.

I am therefore of opinion that the case is properly on the docket of this court, and that the court has jurisdiction thereof.

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The merits of the motion to dissolve the injunction next require attention.

This turns upon the joint resolution of the legislature of March 6, 1869, heretofore referred to. See Acts of 1869, p. 67. If the railroad company, or those claiming under it, have the right to collect wharfage, it is by virtue of that joint resolution, and not otherwise.

In the case of *The City of New Orleans v. The New Orleans, Mobile & Chattanooga Railroad Company*, this joint resolution was considered by the supreme court of this state. The suit was brought to recover the sum of \$764, for wharf dues charged by the city against the railroad company for the barges and flats of the company lying at the wharves referred to in the joint resolution.

The defense was, that under the joint resolution, the railroad company was exempt from the payment of wharfage dues for barges, etc., which landed at said wharf.

To this the city replied, that the joint resolution was unconstitutional, among other reasons, because the legislature transcended legislative powers in passing said resolution, donating public revenues to a private purpose.

In passing upon this objection to the joint resolution, the supreme court of this state says (case not yet published): "The grant was not a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes; to wit, to facilitate the transaction of its business with the public. It was the control by the legislature of a public servitude."

This construction of the resolution is inconsistent with the idea that the right was granted to it by the railroad company to charge wharfage dues against vessels landing at said wharf, which were in no way connected with the business of the railroad company, or that the railroad company might maintain a free wharf for such vessels.

The railroad company owned the banks of the river at the place where the wharves in question are, subject to the public servitude. The legislature granted the company the right to inclose this strip of land along the river bank, and use it, in the

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language of the supreme court, "for public purposes; to wit, to facilitate the transaction of its business with the public." Under this grant, the railroad company claims the right to use the wharves precisely as if they were the private property of a private person, and to collect wharfage from all water craft using them, whether they have any connection with the business of the railroad company or not.

This construction of the grant is clearly opposed to the views of the supreme court of the state. Those views are binding on this court, and, in accordance with them, I must hold that the injunction in this case rightfully issued, and the motion to dissolve it must be overruled.

MORRIS RANGER VS. THE CITY OF NEW ORLEANS.

1. A municipal corporation being required by law to levy an annual tax to pay interest on certain designated bonds, and having levied and collected the tax for that purpose, has no right to divert the fund to other purposes, and, upon application by the holders of the bonds, will be enjoined from so doing.
2. Where a tax to pay interest on certain bonds had been levied by a municipal corporation for a series of years, and the interest due from year to year had been paid in full, although a portion of such interest tax for those years was in arrears, an injunction to restrain the corporation from receiving payment of said arrears in city scrip was refused, it being made to appear, that unless scrip were taken, the tax in arrears could not be collected at all.
3. The charter of a municipal corporation imposed conditions and restrictions upon its power to contract debts and issue bonds. Holders of bonds, issued in pursuance of the charter, made no opposition to the issue, at a subsequent date, of bonds contrary to the restrictions of the charter, and the latter bonds found their way into the hands of *bona fide* holders for value. *Held*: (a) That such irregularly issued bonds were binding on the municipal corporation. (b) That the holders of bonds regularly issued could not assail their validity.
4. Holders of the bonds, regularly issued, had no right to claim that their bonds should be paid in preference to the irregular bonds, out of moneys not specially collected for that purpose, even though the regular bonds were due and the irregular ones were not.

IN EQUITY.

Submitted on motion for injunction *pendente lite*.

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Messrs. H. B. Kelly, D. C. Labatt and J. Aroni, for the motion.

Messrs. B. F. Jonas, City Attorney, and *H. C. Miller*, *contra*.

Woods, Circuit Judge. The bill states in substance, that the complainant is the owner and holder of five bonds of \$1,000 each, dated May 1, 1854, payable in twenty years after date, issued by the city of New Orleans, by authority of act No. 109 of the acts of 1854, authorizing the city of New Orleans to subscribe to the stock of the New Orleans, Jackson & Great Northern Railroad Company, approved March 14, 1854; and also one bond for \$1,000, dated September 1, 1854, due in twenty years after date, and issued by the city of New Orleans by authority of act No. 108 of the acts of 1854, approved March 15, 1854, authorizing the city to subscribe to the stock of the New Orleans, Opelousas & Great Western Railroad Company.

That complainant has brought an action at law against the city on the law side of this court on these and other bonds of the same issue and the coupons attached to them, and has recovered judgments thereon amounting in the aggregate to \$6,000, on which executions have been issued and returned *nulla bona*.

That by the thirty-seventh section of an act approved February 23, in 1852, "to consolidate the city of New Orleans and provide for the government and administration of its affairs," which act was in force when said acts (Nos. 108 and 109) were passed and said bonds issued, it was provided that no future debt or loan should be contracted by the city unless the same should be authorized by a vote of a majority of the voters of the city, and no ordinance creating a debt or loan should be valid unless for some single work or object distinctly specified therein, and unless such ordinance should provide ways and means for the payment thereof, and such ordinance should not be repealed until the principal and interest of the capital borrowed should be fully paid and discharged.

The bill further alleges that by the above named acts, Nos. 108 and 109, under which the bonds held by complainant were issued, it was provided that the subscription to the stock of said railroad companies should be payable in the bonds of the city,

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having twenty years to run; that a special tax on real estate and slaves should be levied in January of each year, sufficient to pay the annual interest on said bonds, to be collected in the same manner as the consolidated loan tax of the city, and that all ordinances, resolutions or other acts passed after the first day of January in each year, except an ordinance for the consolidated loan tax, should be null and void, unless a resolution imposing a special tax for the payment of the interest on the said two series of bonds should be first passed. (Acts of 1854, pp. 69, 70.)

That the same provisions were made by act No. 110 of the acts of 1854, for a tax to pay the interest on bonds issued for stock in the Pontchartrain Railroad Company, subscribed by the city of New Orleans.

That the bonds issued by the city to purchase the waterworks, having been issued in conformity to the provisions of an act passed in 1834, were not required to be issued in the manner prescribed by the consolidation act of 1852.

That these four classes of bonds, to wit: those issued to take up the consolidated debt of the city, those issued to pay for stock in the New Orleans, Jackson & Great Northern Railroad Company, those issued to pay for stock in the Pontchartrain Railroad Company, and the waterworks bonds, are the only bonds issued by the city which were not issued in violation of the aforesaid act of February 23, 1852; that the provisions of said act formed a part of the contract between the city and the holders of said bonds; that all bonds subsequently issued, having been put forth in violation of the said act of consolidation, are, as regards the complainant and those holding similar bonds, null and void, and of no effect in law.

The bill then specifies five acts of the legislature, commencing with act No. 52 of the acts of 1868, which it is alleged were passed in direct contravention of the thirty-seventh section of the act of 1852, by which the city has issued bonds to an amount greater than \$10,000,000.

The complaint of the bill is threefold:

1. That the city is about to divert to other purposes the tax levied and collected for the purpose of paying interest upon the issues to which the bonds held by complainant belong.

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2. That the city has by ordinance authorized the reception of city scrip in payment of the uncollected taxes belonging to the railroad interest fund, for the years from 1860 to 1873, inclusive.

3. That the city has adopted what it calls the premium bond plan, whereby it proposes to pay the principal of bonds not yet due, leaving the bonds of complainant and others of the same issue, and which are now due and payable, unpaid.

And the motion now is that the injunction may issue to restrain the city from doing either of the acts complained of.

Now in the case of *Maenhaut et al. v. The City of New Orleans* (*ante*, p. 108), I allowed the injunction to restrain the city from diverting to other purposes the tax levied and collected for the purpose of paying the interest upon the bonds of the city, and the case made by this bill is substantially the same in this respect as made by the case of *Maenhaut et al.*, and as no injury could result to the city from allowing that part of the injunction prayed for in this case, I will allow the injunction to go to restrain the city from diverting the fund raised to pay the interest of the bonds held by the complainant, and others of the same class, to any other purpose.

The second branch of the injunction prayed for by this bill is to restrain the city from receiving scrip in payment of the uncollected taxes belonging to the railroad interest fund, from the year 1860 to 1873, inclusive. The law under which this fund was raised provided that there should be a levy made each year by the city authorities sufficient to pay the railroad bond interest tax of that year, and it is made to appear by affidavits filed in this case, that the interest upon these bonds has been paid for every year from 1860 up to 1873, inclusive. And it is made further to appear that the unpaid taxes belonging to the railroad interest fund of these years cannot be collected at all, or at least can only be collected with great difficulty, unless payment is received in city scrip. Under these circumstances, it appears to me very clear that this motion, addressed as it is to the discretion of the court, to restrain the city from taking scrip for these years for the interest belonging to the railroad bond fund, should not be allowed. It seems to me that the complainant, in asking this branch of the injunction, is standing in his own light. Even

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if he had the right, which I think he has not, to demand that the injunction should go for this purpose, it seems clear that all the complainant can demand as a matter of right is, that the tax should be levied from year to year to pay his interest, and that his interest should be paid, and that if there is any surplus for any given year of the interest fund, the city having complied with its contract for that year, he has no right to dictate to the city how that surplus shall be applied. But it is very clear to my mind, knowing, as I am enabled to know from years of observation in this court, the condition of the city finances, that it is impossible to collect these old taxes, running from the years 1860 to 1873, unless they are received in something less valuable than money. It is for the interest of this complainant and all the bondholders, that the city should be allowed to collect this tax in such funds as it is able to use in payment of its debts, and thereby relieve itself of its indebtedness to that extent.

The affidavit of the city administrator shows that if these taxes are demanded in money or legal tender currency, they cannot be collected at all. I must, therefore, decline to allow the injunction to go to restrain the city from receiving city scrip in payment of its uncollected tax.

The third branch of the injunction asked for is, that the city may be restrained from applying the funds collected by taxation to the payment of the bonds not yet due, while it leaves the bonds of the complainant, which are due and unpaid, unprovided for.

In the case of *Maenhaut et al. v. The City of New Orleans* (*ante*, p. 108), I expressed the opinion, and I still adhere to it, that the provisions of the thirty-seventh section of the act of 1852 — that act being, in fact, the charter of the city providing how the debts of the city should in future be created, and limiting the power of the city in the contracting of debts — formed a part of the contract between the city and those who received and held the consolidated debt, and the bonds issued by authority of the provisions of the acts Nos. 108 and 109 of the year 1854. In my judgment the holders of the bonds under these two acts had the right to demand of the city, in accordance with the terms of the thirty-seventh section of the act of 1852, that no

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further debt or loan should be contracted by the city unless the same should be authorized by the vote of the majority of the voters of the city, and no ordinance creating a debt or loan should be valid unless for some single work or object distinctly specified therein, and unless such ordinance should provide ways and means for the payment thereof, and such ordinance should not be repealed until the principal and interest of the capital borrowed should be fully paid and discharged.

Now, while the holders of these railroad bonds, consolidated bonds, and waterworks bonds had the right to exact these conditions of the city, they have not seen fit to do so, unless we consider this case as brought by these bondholders to enforce these conditions.

According to the averments of the bill, bonds to the amount of \$10,000,000, or as stated in the argument, \$15,000,000, have been issued since the acts of 1854, not in accordance with the terms of these acts. These bonds, it is fair to presume, are in the hands of *bona fide* holders, and being in the hands of *bona fide* holders, and the city having authority to issue bonds, the *bona fide* holders have the right to presume that the conditions precedent have been complied with, and these bonds are valid and binding upon the city in their hands. *Van Hostrup v. City of Madison*, 1 Wall., 291.

Now the holders of the consolidated debt bonds, and of the railroad bonds, and of the waterworks bonds, had their remedy to restrain the city from issuing these unauthorized bonds, but they did not resort to it. They have waited supinely until this large mass of bonds has been issued by the city in violation, as I think, of their rights, and until these bonds have passed into the hands of *bona fide* holders, and it is now too late for them to set up any claim that these bonds are invalid and have no rights as against them or against the city.

These bondholders were asleep when they should have been awake. They should have looked after their interests when the issue of these bonds was *in fieri*, and not have waited until they fell into the hands of innocent holders. So that, in my judgment, these bonds are binding now upon the city, and they are good as against the holders of the bonds regularly issued.

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Now, the question submitted to the court is, Have the holders of these bonds which I have just named — the railroad bonds, the waterworks bonds and the consolidated bonds — the right to dictate to the city how it shall apply its funds raised by taxation? The right to demand that the fund raised for the interest upon their bonds shall be applied to the payment of their interest is conceded; but in this bill the complainant goes further, and he demands that other funds, not raised specially to pay his interest, or to pay his principal, shall not be applied to the payment of the other bonds; in other words, he asks the court to substitute its discretion for the discretion of the officers of the city in the administration of the finances. If there was any trust fund which he had the right to subject to the payment of his principal or interest, the court would enforce the trust; if he had a lien upon any particular fund, the court would enforce the lien; but he does not make such a claim. He simply asks that the city be restrained from taking its own money and applying it to the payment of its debts according to its own discretion; in other words, to substitute his discretion, and the discretion of this court, for the discretion and judgment of the officers of the city, to whom the law has confided the administration of the city finances. It seems to me that the complainant has mistaken his remedy. He has his bonds and judgment upon them, and he has the right to have a tax levied to pay the principal and interest upon these bonds. That is the only right he has, and that right is only to be secured by the common law remedy of *mandamus*; but he has no right to demand that the fund raised by the city, not for the payment of the principal and interest of his bonds, should not be used by the city according to its own discretion.

I will allow the injunction to go to prevent the city from using for any other object, any of the money collected for the purpose of paying interest on the bonds of the complainant and others holding like bonds, but I must decline to restrain the city from the receipt of scrip in payment of the interest tax upon all the years running from 1860 to 1873, and must decline to interfere with the premium bond plan, by enjoining the city from paying its debts as it pleases.

Bonner vs. The City of New Orleans.

WILLIAM BONNER VS. THE CITY OF NEW ORLEANS et al.

1. A railroad company is bound as indorser of a negotiable bond issued by a municipal corporation, payable to the railroad company or assigns in twenty years, which the company has transferred by indorsement; the municipal corporation having failed to pay on demand at maturity, and the proper steps having been taken to charge the company as indorser.
2. To charge an indorser, the certificate of the notary need not show that notice of demand and nonpayment was served on the indorser during business hours of the day after demand. If notice was served at any time during that day, it is sufficient.

This was an action brought by the holder of a bond for \$1,000, issued by the city of New Orleans, payable to the New Orleans, Jackson & Great Northern Railroad Company, or their assigns, in twenty years from date, with interest, and dated May 1, 1854.

It appeared on the face of the bond, that it was one of a series of two thousand bonds of \$1,000 each, authorized by an act of the legislature of Louisiana, approved March 15, 1854, to be issued by the city to the railroad company in payment of the subscription of the city to the stock of the railroad company, and transferable by the indorsement of the president and secretary of the railroad company.

The plaintiff offered the bond in evidence and proved the indorsement of the president and treasurer of the railroad company, which was in these words:

"The New Orleans, Jackson & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns."

The indorsement of the bond by the latter company to the plaintiff was also shown.

The plaintiff also introduced the certificates of the notary public, under his seal, to the effect that he had demanded payment of the bond of the city of New Orleans, both on the 1st and 4th of May, 1875, and that payment was on both occasions refused, and that on both the 2d and 5th of May, he had delivered notices of protest to S. H. Edgar, the vice president of the railroad company, at its office in New Orleans, the president of the company being absent.

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Upon these facts, the city of New Orleans admits its liability, but the railroad company denies that any ground for recovery against it is shown. No recovery is asked against the Savings Institution.

Mr. John M. Bonner, for plaintiff.

Mr. B. F. Jonas, City Attorney, for the city of New Orleans.

Mr. T. J. Semmes, for the railroad company.

Woods, Circuit Judge. The bond is a negotiable instrument, having all the qualities of commercial paper. *Commissioners of Knox County v. Aspinwall*, 21 How., 539; *Mercer County v. Hackett*, 1 Wall., 83; *Gelpcke v. The City of Dubuque*, 1 id., 175; *Meyer v. City of Muscatine*, 1 id., 384.

But while this general proposition is not disputed, it is claimed that the effect of the indorsement of the railroad company was simply to transfer the title to the bond, and the company did not thereby enter into the conditional contract to pay the bond which results from the indorsement of ordinary commercial paper. In short, that by its indorsement the company did not assume the liability of an indorser.

The authorities cited do not justify the distinction drawn. These bonds are said to have all the qualities of commercial paper. One of these qualities is that the indorser becomes bound in case of demand, nonpayment and notice.

The act of the legislature, recited on the face of the bond, gives the railroad company express power to transfer the bonds by indorsement. The railroad company has exercised the power and there is no reason why it should not assume the responsibilities of the act, unless it is made to appear that no such responsibility was fairly in the contemplation of the railroad company or the commercial public to whom the bonds were sold.

The indorsement is unrestricted. The railroad company might have qualified its indorsement if it had so chosen, and thus have avoided liability. Having power to indorse, it would seem that it assumed by its indorsement the same liabilities as an individual.

Doubtless the credit of the bond was improved by the indorsement of the railroad company, and the fair presumption is that

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the indorsement was made not only to transfer the bond but to add to its credit. If this be true, the company ought to be held to its liability as indorser.

But it is said this liability was not fairly in the contemplation of the parties to the bond; that the bond had twenty years to run; that many similar bonds have forty or fifty years to run, and it is not to be supposed that the indorser or holder contemplated that the conditional liability of an indorser of such paper should hang over him for a time; in all probability reaching beyond his natural life.

There would be force in this argument if the indorser were a natural person. But a railroad corporation does not die. It may live for centuries, and there is no reason why it should not indorse bonds, and have its liability as indorser fixed by demand and notice on bonds running twenty, forty or sixty years.

In my judgment, the argument to relieve the railroad company of its liability as indorser on these bonds cannot prevail.

It is said by way of further defense that the certificate of the notary does not show that notice of demand and nonpayment was served on the vice president of the railroad company during business hours of the day, after demand. The protest shows that notice was given to the principal officer of the company present in the city at the office of the railroad company during the next day. That is a sufficient service of notice. It need not be served within business hours. Bayley on Bills, ch. 7, sec. 2, 268 (5th ed.); Story on Bills, secs. 288-90, 382; Chitty on Bills, ch. 10, 513, 514, 518 (8th ed.)

FERDINAND M. GOODRICH VS. LOGAN HUNTON.

1. Generally, under the jurisprudence of Louisiana, a judgment rendered against a party whose domicile is not in the parish where the court is held is void; and,
2. Generally, after the dissolution of a partnership, the partners must be sued in the parish of their domicile.
3. But notwithstanding the dissolution of a partnership, it still continues for the

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purpose of liquidation and partition of its assets, and all the partners can be legally sued in the domicile of the firm for such purposes.

4. A discharge in bankruptcy must be pleaded. It cannot be set up after judgment as a reason why the judgment should not be enforced.

IN EQUITY.

The case was as follows: Hunton, the defendant, brought an action at law in the fourth district court for the parish of Orleans, against the commercial firm of Pilcher & Goodrich, the Goodrich of said firm being the complainant in this case. In said action Hunton, on the 23d day of January, 1874, recovered a judgment against said firm for \$2,500, with interest at eight per cent. from May 1, 1861.

Thereupon the complainant, Ferdinand M. Goodrich, filed his petition in the same state court which had rendered the judgment against Pilcher & Goodrich, in which he represented that the judgment was null and void, and that Hunton was about to enforce it, and prayed for the writ of injunction to restrain him from so doing. The state court allowed the injunction to go as prayed for. Afterwards Hunton filed his petition and bond for the removal of the case made by the petition to this court, Hunton being a citizen of Missouri and Goodrich of Louisiana, and the cause was removed to this court, where it came on for final hearing and decree.

Mr. Geo. L. Bright, for complainant.

Messrs. Thomas Hunton and J. Ad. Rosier, for defendant.

Woods, Circuit Judge. The grounds upon which complainant asks that there be decreed in his favor a perpetual injunction against the execution of said judgment are two:

1. He says that the court which rendered the judgment had no jurisdiction over his person, and so far as he is concerned, the judgment is null and void. The claim is that the firm of Pilcher & Goodrich, which, during its continuance, had been domiciled in New Orleans, was dissolved before the action of Hunton was commenced in the state court; that at the commencement of the suit, the complainant Goodrich had his domicile, not in New Orleans, but in the parish of Carroll, and could not, therefore, be sued in a court of the parish of Orleans; that the service of the

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citation issued against him from a court of the parish of Orleans was null and void, and the judgment rendered on such service was therefore null and void.

To support this claim, the complainant relies on art. 162 of the Code of Practice, which declares:

"It is a general rule in civil matters that one must be sued before his own judge; that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the purpose of being sued; but this rule is subject to those exceptions expressly provided for by law."

Among the exceptions to this rule is the following, as expressed in art. 165:

"In matters relative to partnership, as long as the partnership continues, in all suits concerning it, the parties must be cited to appear before the tribunal of the place where it is established."

The complainant says that the partnership having been dissolved before the suit against the firm of Pilcher & Goodrich was commenced, the case would not fall within the above exception to art. 162, and he could not be sued out of the parish of his domicile, to-wit, the parish of Carroll.

That a judgment rendered against a party whose domicile and residence is not in the parish where the court is held, is null and void, is sustained by the following decisions: *State of Louisiana v. The Judge*, 21 La. An., 258; *State of Louisiana v. Head*, id., 550; *Richardson v. Hunter*, 23 id., 255.

It has also been held that after dissolution of partnership, the partners must be sued in the parish of their domicile. *Marsh v. Marsh*, 9 Rob., 45; *Hobson v. Whittemore*, 13 La., 423; *Black v. Savory*, 17 id., 85.

The reply of the defendant to these authorities seems to me to be clear and conclusive.

The evidence in this case establishes beyond controversy that the partnership of Pilcher & Goodrich was in the course of liquidation when the suit of Hunton was brought in the fourth district court for the parish of Orleans; and the authorities are clear that while the partnership is in liquidation, it continues,

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and the case must therefore fall within the exception to art. 162, made by art. 165 of the Code of Practice above cited.

Art. 165 was taken *verbatim* from art. 159 of the French Code of procedure, and the French authorities, in construing that article, have declared that notwithstanding dissolution, the partnership still continues for the purpose of liquidation and partition, and that all the partners could be legally cited to appear before the tribunal of the domicile of the firm for the above purpose. 2 Troplong de la Société, 472; No. 1004; 11 Répertoire du Journal du Palais, verbo Société, 827; Cour d'Appel de Liège, 1842, p. 321.

The supreme court of Louisiana, following the French authorities, has held that the partnership, although dissolved, still continues for the purposes of liquidation and partition of gains, and that the partners might be sued at the domicile of the partnership for such purposes. *Lobdell v. Bushnell*, 24 La. An., 296.

Following the construction of the supreme court of this state of articles 162 and 165 of the Code of Practice, as I am constrained to do, I am of opinion that the partnership of Pilcher & Goodrich was in existence when the suit of Hunton against the firm was brought; that by service of citation issued from the fourth district court of the parish of Orleans, the court acquired jurisdiction over the person of the defendant Goodrich, and that the judgment against him is valid and binding.

2. But the complainant says that before the rendition of the judgment against him at the suit of Hunton, he had been discharged in bankruptcy.

This is no reason for restraining the execution of the judgment. The discharge in bankruptcy was a defense which should have been pleaded to the action. As Goodrich failed to set it up against the suit of Hunton, he cannot now aver it as a reason why the judgment should not be enforced.

There is no ground shown for maintaining the injunction issued by the state court. It must be dissolved and the bill dismissed at the complainant's costs.

Jackson vs. The Vicksburg, Shreveport & Texas Railroad Company

HENRY R. JACKSON VS. THE VICKSBURG, SHREVEPORT & TEXAS
RAILROAD COMPANY et al.

A railroad company executed bonds for £225 each, if payable in London, or for \$1,000 each, if payable in New York or New Orleans, and with coupons attached, by each of which the company promised to pay £9, if payable in London, or \$40, if payable in New York or New Orleans, and the bonds declared that the president of the company was authorized by his indorsement to fix the place for the payment of both the principal and interest of the bonds. The bonds were indorsed as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in —," and the indorsement was signed with the genuine signature of the president. *Held*,

(a) That while in this condition, the bonds were not negotiable instruments.

(b) That if such bonds were stolen from the company, and passed into the hands of *bona fide* holders for value, such holders would have no authority to fill the blank left in the indorsement and thus fix the place of payment, but would hold the bonds subject to any defect of title arising from the manner in which they were put in circulation.

IN EQUITY.

This cause was heard upon exceptions filed to the report of the master.

The purpose and prayer of the bill was to sell the road of the defendant company to pay the bonds secured by a mortgage executed by the company.

A reference was made to the master to ascertain and report what bonds were *bona fide* issued by the Vicksburg, Shreveport and Texas Railroad Company, the names of the owners, and the amounts due to the holders of said bonds so issued.

The master reported seven hundred and fifty bonds of \$1,000 as having been *bona fide* issued by the company, and as secured by said mortgage.

The report then gives a list of two hundred and twenty-eight bonds of \$1,000, which the master says were not *bona fide* issued by the railroad company, and are not secured by the said mortgage.

To this part of the report, exceptions have been filed by several of the holders of the excluded bonds, on the ground that the

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master erred in reporting that said bonds were not secured by the mortgage. Upon these exceptions the case was heard.

Messrs. Thos. Allen Clarke, Thomas L. Bayne and Joseph P. Hornor for the exceptions.

Mr. John A. Campbell, contra.

Woods, Circuit Judge. The facts upon which the master relied for the basis of so much of his report as is excepted to are as follows: In April, 1864, during the late war carried on by the United States against the seceding states, the bonds in question were in the office of the railroad company at Monroe, Louisiana. During the month just named, a raid was made upon Monroe by the naval forces of the United States, and at that time the office of the company was broken open and these bonds carried off by persons connected with the expedition, without the consent or knowledge of any of the officers of the company. In short, the bonds were stolen from the office of the company. They were afterwards put in circulation, and bought by the holders at from fifteen to twenty cents on the dollar. The face of the bonds certified that "the Vicksburg, Shreveport & Texas Railroad Company is indebted to John Ray or bearer, for value received, in the sum of either two hundred and twenty-five pounds sterling, or one thousand dollars lawful money of the United States of America, to-wit: two hundred and twenty-five pounds sterling, if the principal and interest are payable in London, and one thousand dollars lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans, which sum said company promises to pay to John Ray or bearer, on the first day of September, A. D. 1877, and also to pay interest thereon, at the rate of eight per cent. per annum, on the first day of March and the first day of September of each and every year. * * * And the president of said company is authorized to fix, by his indorsement, the place of payment of principal and interest in conformity with the tenor of this obligation." The bonds were signed by the president and treasurer, and bore the seal of the company.

Upon the back of each of the bonds in question was an indorsement as follows: "I hereby agree that the within bond and

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the interest coupons thereto attached shall be payable in ———. C. G. YOUNG, president."

The coupons attached to said bonds declared that "the Vicksburg, Shreveport & Texas Railroad Company will pay the bearer hereof (on a specified date) nine pounds sterling, if payable in London, or forty dollars, if payable in New York or New Orleans."

Upon this state of facts, the question for solution is, whether the bonds are good in the hands of *bona fide* holders for value. If the bonds are negotiable, this inquiry must be answered in the affirmative.

Generally, bonds issued by a corporation, and payable to bearer, have the qualities of negotiable instruments. *Com'rs of Knox County v. Aspinwall*, 21 How., 539; *Woods v. Lawrence County*, 1 Black, 386; *Mercer County v. Hackett*, 1 Wall., 83. But it is claimed that there are peculiarities about these stolen bonds which deprive them of their character as negotiable instruments. These are, that the amount for the payment of which the bond is given is uncertain. It is clear that the sum of £225 payable in London, with £9 interest payable every six months, at the same place, is entirely different from \$1,000 payable in New York or New Orleans, with \$40 interest payable semi-annually at the same places. This uncertainty, unless cured, robs the bonds of their character as negotiable instruments. Story on Prem. Notes, secs. 20, 21; Story on Bills, sec. 42; Bayley on Bills, 11; Parsons on Notes and Bills, 37.

But it is claimed that the uncertainty is cured by the genuine signature of the president of the railroad company, appended to the indorsement upon the bonds, and above set forth. It is true that the indorsement leaves the place of payment blank, and so leaves the amount and interest of the bonds uncertain. But the argument is, that the president having signed the indorsement and left the place of payment blank, the holder is authorized to fill the blank, and thus render the amount of the bond definite and certain, and that that is certain which can be made certain.

If the holder of the bond were authorized to fill this blank, doubtless the results claimed to flow from this fact would follow. But is the holder of these stolen bonds authorized to fill this

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blank in the indorsement? He is not expressly authorized; for the bonds say that the place of payment should be designated by the president. Can it be said that when the president signed the indorsement and left the place of payment blank, he authorized any one who might steal the bonds, or to whom the thief might sell them, to fill the blank? If any one was authorized by implied contract to fill the blank, it was some person to whom they had been issued by the company, or who had acquired them after such *bona fide* issue. There can be no implied authority to any one to fill the blank, unless the bonds were *bona fide* issued and delivered by the railroad company. To hold that a thief of the bonds, or any one holding under him, had implied authority to perfect the bond, appears to me to be entirely untenable.

The uncertainty in the bond as to amount of both principal and interest and place of payment remains, notwithstanding the signature of the president to the indorsement, and this uncertainty deprives the bonds of the quality of negotiable instruments. The holders, though *bona fide* for value, are not protected by the rules which govern the transfer of commercial paper, and must hold the bonds subject to all the infirmities which attach to the title to them.

These views are sustained by the court of appeals of the state of New York, in a case arising upon some of these same stolen bonds, in which it was decided that a *bona fide* holder of the bonds was not authorized to fill the blank left by the president in the indorsement, and that he acquired and could convey no title to the bonds. *Ledwich v. McKim*, 53 N. Y., 307.

The exceptions to the master's report must be overruled, and the report confirmed.

CHARLES H. KILGOUR vs. THE NEW ORLEANS GAS LIGHT COMPANY et al.

1. A bill which charges that the defendant, through fraudulent practices, had secured the transfer to his own name of shares of stock in an incorporated company, to which the complainant held the equitable title, and prayed that

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the complainant might be declared the owner of the stock, presents a good case for the intervention of a court of equity.

2. In such a case there is no adequate relief at law.
3. An alternative prayer does not necessarily make a bill multifarious.
4. If process is prayed against all the necessary parties to a bill, a demurrer to the bill for want of proper parties will not lie, on the ground that some have not been served.
5. Shares of stock in an incorporated company, held and claimed by a nonresident of the district within which the company has its domicile, cannot be considered "personal property within the district," so as to authorize the court in a suit in which plaintiff sets up title to the stock, to order the holder to be constructively served in the manner provided by sec. 733, Rev. Stats.

IN EQUITY.

Heard on demurrer to the bill.

The case was as follows: The bill was filed by complainant, who is a citizen of Ohio, against the New Orleans Gas Light Company, Thomas L. Wibray and John M. Conway, citizens of Louisiana, and Henry Y. Attrill, a citizen of New York.

It was alleged that the New Orleans Gas Light Company was a corporation existing as the result of a consolidation of two other incorporated companies of the state of Louisiana, united by virtue of the statutes of the state, to wit: the Crescent City Gas Light Company and the New Orleans Gas Light Company. The complainant alleged that from and after March 26, 1871, he had been the owner of 1,500 shares of stock in the latter company, of which the defendant Attrill was the president; that Attrill conspired and confederated with the defendant Wibray and certain other persons not named, to obtain control of the Crescent City Gas Light Company, and to defraud all the stockholders out of their stock. In pursuance of this conspiracy, he obtained a large amount of the stock. Through collusion with the directors of the company, he caused large assessments to be made upon the stock, amounting in the aggregate to seventy-six per cent. of all the capital stock; but they were never actually collected from the stockholders. For nonpayment of these assessments, which were fraudulent and unnecessary, the directors pretended to forfeit the stock of complainant, and the same was subscribed for by Attrill, who claimed, to have become the owner thereof. The assessments were part of the scheme by which

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to defraud the complainant and other stockholders of their stock, and to get the same into the possession of Attrill and his confederates.

The bill further alleged that having obtained all, or nearly all of the stock by these fraudulent means, Attrill caused himself and the said defendant Wibray and others to be elected directors of the company, and himself to be elected president; that Attrill and his confederates having thus obtained control of the Crescent City Gas Light Company, Attrill, claiming in fact to own all the stock, entered into a contract, dated March 29, 1875, authorized by an act of the legislature, for the consolidation and union of said company with the New Orleans Gas Light Company. By this contract, which was made an exhibit to the bill, it appeared that the stock of the consolidated company was stated to be three million, seven hundred and fifty thousand dollars paid up (37,500 shares), which might be increased to ten millions from the accumulated earnings of the company, invested in works or "plant" during the operation of the company, and such issues of new stock were to be distributed *pro rata* among the stockholders of the consolidated company.

Of the 37,500 shares, twenty-five thousand were to be distributed *pro rata* among the stockholders of the New Orleans Gas Light Company.

All the certificates of stock issued by the Crescent City Gas Light Company, being 30,000 shares, were to be considered annulled and canceled, and of no legal effect, and in no manner binding on the consolidated company, and in lieu thereof there were to be issued to Henry Y. Attrill, as representative of the stockholders of the Crescent City Gas Light Company, 12,500 shares of the paid up stock of the new consolidated New Orleans Gas Light Company.

The claim of the bill was that the assessments made on the stock of complainant in the Crescent City Gas Light Company were fraudulent; that the alleged forfeiture of his stock, and the subscription therefor by Attrill, was fraudulent; that complainant continued to be and still was, the equitable owner of the stock, and was entitled to either 1,500 shares in the Crescent City Gas Light Company, if the consolidation of that company with the New

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Orleans Gas Light Company should be set aside, or to a proportionate number of shares in said latter company, if the consolidation of the two companies should be sustained.

The averments of the bill touching the fraudulent practices of Attrill and his associates amounted to the allegation that the contract for consolidation was entered into without authority therefor from the Crescent City Gas Company, and is therefore void; but no such averment was distinctly made.

The prayer of the bill was, that if the court was of opinion, and should decree that the contract of consolidation between the two companies was binding, in that case, that the complainant might be declared the rightful owner of 625 shares of the stock in the consolidated New Orleans Gas Company, that number being his proportionate share of the 12,500 shares allotted to the stockholders of the Crescent City Gas Light Company.

But if it should be declared that on account of the fraudulent practices of Attrill and his associates, they were not authorized to make said contract of consolidation on the part of the Crescent City Gas Light Company, and the contract of consolidation was therefore unauthorized and void, that in that event, the complainant might be declared to be the owner of his said fifteen hundred shares of stock in the Crescent City Gas Light Company.

To this bill the New Orleans Gas Light Company filed a demurrer for want of equity.

On this demurrer the case was argued and submitted.

Messrs. F. C. Zacharie, Samuel R. Walker and C. L. Walker, for complainant.

Messrs. T. J. Semmes and Robert Mott, for the New Orleans Gas Light Company.

WOODS, Circuit Judge. The objections made to the bill in the argument were:

1. Want of equity.
2. Multifariousness.
3. Want of proper and necessary parties.

1. In my judgment, the bill has equity. Its averments bring it under the well known head of equity jurisprudence—fraud.

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The practices charged against Attrill and his associates make a strong case for the interposition of a court of equity.

It is clear that there is no adequate remedy at law. A money judgment against Attrill for his fraudulent conversion of the stock of complainant would not give complainant the relief he wants. The purpose of the bill is the recovery of complainant's stock, of which he has been fraudulently dispossessed by Attrill, who claims title to it. Clearly, this result can only be reached by the decree of a court of equity.

There may be defects in the frame of the bill which require amendment, but the case as stated seems to me to be clearly one of equitable cognizance.

2. The bill is not multifarious. "By multifariousness is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as for example, by uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." 1 Cooper's Eq. Pl., 182; *Saxton v. Davis*, 18 Ves. Jr., 72.

The single purpose of the complainant is to follow and recover the stock which he once held in the Crescent City Gas Light Company. If, in order to do this, it should be necessary to declare the consolidation between the Crescent City Gas Light Company and the New Orleans Gas Light Company void, it cannot be said that this would be joining distinct and independent matters.

The only apparent ground for the charge that the bill is multifarious is found in its alternative prayer. This is not an objection to the bill. It often becomes necessary for the equity draftsman to frame the prayer of his bill in the alternative. 1 Story's Eq. Pl., sec. 42; Mitford's Eq. Pl., 67; *Colton v. Ross*, 2 Paige, 396; *Lloyd v. Brewster*, 4 id., 537; Adams' Eq., 508.

3. There appears to be no want of necessary parties. The only defect of parties alleged is in the fact, that Attrill, who is a citizen of New York, is not served with process.

Nevertheless, he is made a party by the averments of the bill, and there is prayer for process against him. It is true he is

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not yet served, but that is no defect of the bill. *Non constat* but he may enter his appearance, or may be found in the district and served with process.

That he is a necessary party is perfectly clear. The controversy raised by the bill is a controversy between him and the complainant over the ownership of the fifteen hundred shares of stock in the Crescent City Gas Light Company, or a proportionate number of shares in the New Orleans Gas Light Company. The latter company is a mere stakeholder, entirely indifferent where the stock goes.

It follows that the case can make no progress until Attrill is brought in by service of some kind, or by his entering his voluntary appearance; but as he may be brought in by service or may enter a voluntary appearance, it would be premature to sustain a demurrer to the bill, because he is not already served. I am of opinion, therefore, that none of the grounds of demurrer are well taken, and that the demurrer must be overruled.

The complainant claims that Attrill may be brought in under section 738 of the Revised Statutes.

This section declares: "When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of, nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day therein to be designated, and the said order shall be served on such absent defendant, if practicable, wherever found, or when such personal service is not practicable, shall be published in such manner as the court may direct. If such absent defendant does not appear, etc., it shall be lawful for the court, upon proof of the service or publication of said order, etc., to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district. But the adjudication shall, as regards such absent defendant without appearance, affect his property within such district only."

It may be premature before motion is made for an order for

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constructive service as provided for in this section, to pass upon the question whether the present is a case to which this section applies, but as counsel have argued the question, I shall proceed to dispose of it.

Constructive service can only be made in "a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district." The case presented by the bill, if it falls within the section at all, is the case of a claim against personal property.

If the property against which claim is set up is the 1500 shares in the Crescent City Gas Light Company, that stock is in the possession of Attrill who holds the legal title thereto according to the averments of the bill, and Attrill is in New York. Can these shares be said to be property within this district? From the fact that the property of the gas company is in this district, it does not follow that the shares of stock are in this district. The property of the company is mainly real estate; the shares of stock are personal property.

"The possession of capital stock does not give a person a particle of legal interest in the corporation property. Though he possesses one-half the entire stock, he is not therefore the owner of one-half the corporate property.

"The corporation still owns it all. There is no divided ownership in the case. Possession of the stock merely entitles the holder to a right to vote, a right of dividend, a right to the faithful appropriation of the funds. These rights are very different from the right of property." Per BRADLEY, J., in *Morgan v. The Railroad Co.*, 1 Woods, 18.

When, therefore, Attrill became the holder of the shares claimed by complainant in the Crescent City Gas Light Company, and went to New York, he carried the property in the shares with him, for shares of stock in an incorporated company such as a canal, waterworks or gas company are, unless otherwise provided by the charter, personal property. *Edwards v. Hall*, 6 DeG., M. & G., 74; *S. C.*, 35 Eng. Law & Eq., 433; *Tippetts v. Walker*, 4 Mass., 595; *Bradley v. Holdsworth*, 3 M. & W., 422; *The King v. Capper*, 5 Price, 217; *Johns v. Johns*, 1 Ohio St., 350. And personal property follows the person.

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Morgan v. Parham, 16 Wall., 471. These shares considered as part of the stock of the Crescent City Gas Light Company cannot therefore be said to be property within this district.

If these 1500 shares in the Crescent City Gas Light Company are to be considered as merged in the stock of the New Orleans Gas Light Company, the shares in the latter company are still the property of Attrill who holds the title to them, and follow his person to New York where he is.

In the event that the consolidation of the two companies is confirmed, there is another obstacle to an order for constructive service. The claim of the complainant is not for any particular shares of stock that can be designated by number or identified as possessed by a particular person, but it is for 650 shares out of 12,500 shares. Clearly a claim to a given number of shares of stock, not yet designated or ascertained, cannot be said to be property within the meaning of sec. 738, Rev. Stat. The case provided for by the statute is a legal or equitable lien or claim on real or personal property. The right asserted by the complainant to undesignated shares of stock is a chose in action, but is neither real nor personal property, within the meaning of the statute.

I am therefore of opinion that Attrill cannot be made a defendant to this suit by constructive service.

ELLEN C. REID vs. A. ROCHEREAU & Co. et al.

1. A married woman cannot convey or incumber her real estate except in the manner prescribed by law.
2. She is not bound by a false declaration made in a mortgage executed by her, to the effect that the mortgaged property was community property, even if the mortgage is executed with all the forms prescribed by law.
3. Where a married woman had a separate paraphernal fund amounting to \$6,429, and invested it in property which cost \$10,370, the excess being paid out of the community funds, and took the deed in her own name: *Held*, that the property belonged to the community, and the married woman became the creditor of the community for the amount so invested by her.

IN EQUITY.

Heard on pleadings and evidence for final decree.

Reid vs. Rochereau & Co.

This was a bill filed by Mrs. Ellen C. Reid, her husband, Andrew J. Reid, appearing as her next friend, to set aside a sale of certain real estate in the city of New Orleans, made by the assignee in bankruptcy of the said husband, Andrew J. Reid, the property having been sold as part of the bankrupt estate.

The facts, as disclosed by the evidence, were as follows: The complainant and Andrew J. Reid were married in 1862. At the time of her marriage, the complainant received from her father, as a marriage gift, the sum of \$2,100 in gold and silver coin, which she managed and administered until the year 1867, at which time it had increased to the sum of \$3,100 in United States currency. In August, 1867, the mother of complainant gave her the sum of \$3,329; so that, at that time, the complainant had in her possession, as her separate paraphernal property, the sum of \$6,429.

The complainant, in May or June, 1867, made a bargain with one Harrell for the purchase of two lots, the same being the property in controversy in this case. The price agreed on was \$2,200, of which \$1,000 were paid in August or September by complainant out of her paraphernal funds. On the 30th of December, 1867, Harrell, by notarial act, conveyed the premises of Mrs. Ried, and on the 10th of March, 1868, she paid to him out of the same fund, as she claimed, the residue of the purchase money of the lots, to-wit: \$1,200. Although the conveyance was made to Mrs. Reid, it did not recite that the purchase money was paid out of her separate paraphernal estate, nor that the property conveyed was to be held as her separate property. Soon after making the bargain with Harrell for the purchase of the lots, the complainant made a contract for the erection on them of a dwelling, for the price of \$7,500. The dwelling was completed in the autumn of 1867, and the price agreed on was also paid out of the paraphernal funds of complainant, as she claims.

On the 26th of March, 1873, Andrew J. Reid, the husband of complainant, and complainant herself joined in an authentic act before James Fahey, notary public, whereby, to secure the sum of four thousand four hundred and fifty-six dollars, then loaned by T. M. Hyde to Andrew J. Reid, they conveyed the said premises to said Hyde.

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This act of mortgage contained the following declaration: "And here the said Andrew J. Reid and Mrs. Ellen C. Reid mutually declare that although the herein above described and mortgaged property was acquired in the name of Mrs. Reid, as aforesaid, nevertheless the same was purchased with funds belonging to the community then existing and which now exists between them, and really belongs to said community."

Reid, the husband, had represented to the notary who drew up the act, that the property was community property, and it was upon the strength of his announcement that the above clause was inserted in the act.

The act was not signed by Mrs. Reid in the presence of the notary, but of one Jones, the clerk of the notary, who afterwards, on the same day, subscribed the act as a witness. Mrs. Reid knew that the act was a mortgage for \$4,400 on the property therein described, and that the money was to be paid her husband, to enable him to commence business; but the mortgage was not read to her in full; the written parts, including the clause above quoted, were explained to her by Jones, who offered to read the entire act; but Mrs. Reid said it was unnecessary, as she understood what it was.

The notary himself never explained to Mrs. Reid the nature and character of the act separate and apart from her husband before she signed the same. In fact he never saw complainant until long after the execution of the mortgage.

The money raised on the mortgage, to-wit, \$4,400, was paid by Hyde, the mortgagee, to complainant's husband, and was used by him in his business.

The bill claimed that the property so mortgaged was the separate paraphernal property of complainant, and that the mortgage, made to secure the said sum of money for her husband was void; and the bill prayed that it might be so declared, and that the sale of said property, by virtue of the proceedings in bankruptcy against complainant's said husband, might be set aside and declared void, and that the purchasers at said sale might be perpetually enjoined from interfering with complainant's possession.

Mr. John McEnery, for complainant.

Reid vs. Rochercau & Co.

Messrs. T. J. Semmes, Robert Mott and C. E. Schmidt, for defendants.

WOODS, Circuit Judge. The mortgage, purporting to be executed by Andrew J. Reid and his wife, the complainant, was not executed according to law by the complainant, and was not effectual to bind her separate estate. Though signed by the wife, it is not her deed.

If the property were her separate property, the law points out the manner in which she should proceed to mortgage it for the benefit of her husband, and that method was not pursued. By the civil as well as by the common law, the property of the wife cannot be conveyed or incumbered except in the manner prescribed by law.

The wife is not estopped by the declaration made in the mortgage to the effect that the mortgaged property was community property, even if the mortgage had been executed with all the forms prescribed by law.

Bouligny v. Fortier, 16 La. An., 209; *Beauregard v. Her Husband*, 7 id., 293; *Thibodeaux v. Hespín*, 5 id., 578; *Bisland v. Provosty*, 14 id., 169; *Gasquet v. Dimitry*, 9 La., 589.

The mortgage in question not having been executed by the complainant according to law, the statement therein made, that the property mortgaged was community property no more binds the wife than a declaration made orally to the mortgagee that such was the fact. As the wife cannot be estopped by any such declaration, the question is left entirely open for examination: Was the property mortgaged the paraphernal property of the wife or was it the property of the community?

If it was the former, the mortgage is void; if the latter, it is valid and binding.

The evidence shows that the lots and the house erected thereon cost \$9,700. In addition to this sum, there was expended in additional permanent improvements on the premises in 1871 and 1872, the further sum of \$670, thus making the entire cost of the property \$10,370. The entire paraphernal estate of the complainant invested in the property was, \$6,429. Now, under this state of facts, what are the rights of the wife, complainant in this case?

I think this question is conclusively settled by the decisions of the supreme court of Louisiana.

In the case of *Bass v. Larche*, 7 La. An., 104, the husband claimed, as his separate property, certain lands and slaves purchased by him during the marriage. In passing upon the case the court said: "The plaintiff purchased property to a much larger amount than he had funds to pay for at the time, gave some obligations, and assumed the payment of others; it may be doubted whether such a purchase could, under any circumstances, be considered as an investment of separate funds."

In the case of *Bouligny v. Fortier*, 16 La. An., 214, the court say: "We have searched in vain in our reports for a case where the right of the wife to invest beyond her means was sanctioned by this court, but we have, on the contrary, found numerous decisions setting aside conveyances made to the wife on her failure to show adequate means.

"As the ability of the wife to acquire during the marriage, property in her own name and for her separate account is, under our jurisprudence, an exception to the general rule (Civil Code, 2374), it must be, therefore, rigidly and strictly construed, and, consequently, the wife is required not only to prove that she had paraphernal effects at her disposal, but also that they were ample to enable her reasonably, at least, to make the new acquisition; otherwise the contract will be treated as a contract of the community."

These authorities seem to settle the case against the claim of the complainant. Giving the largest effect to the testimony of complainant, she only had \$6,429 to invest in the property, and the evidence shows beyond question that it cost \$10,370. It seems clear that when a wife mingles her own paraphernal funds with the community funds, in the purchase of property, she cannot claim the whole as her separate estate. The property belongs to the community, and she is the creditor of the community to the amount of her investment.

Such I believe to be the decisions of the supreme court of this state on this subject, and they are binding on this court.

The complainant's bill must, therefore, be dismissed at her costs.

Ellery, Wendt & Co. vs. Brown & Co.

ELLERY, WENDT & HOFFBAUER VS. A. BROWN & Co.

When suit is brought against two debtors bound *in solido*, and service of citation made on one only, prescription in favor of the other is suspended during the pendency of the action against the one who is served, and is not merely interrupted by the service.

ACTION AT LAW.

Heard on plaintiffs' motion for new trial.

Messrs. Joseph P. Hornor and W. S. Benedict, for plaintiffs.

Messrs. Thomas Allen Clarke, Thomas L. Bayne and Henry Renshaw Jr., for defendants.

Woods, Circuit Judge. The facts were these: The plaintiffs, on October 14, 1865, brought this suit against the commercial firm of A. Brown & Co., domiciled in the city of New Orleans, and composed of Andrew Brown and W. S. Key. The suit was predicated upon two drafts dated December 4, 1860, for \$2,364 each, payable three days after sight, drawn by T. S. Powell & Co., and indorsed by the firm of A. Brown & Co., and on two other drafts, one for \$2,365 and the other for \$2,419, drawn also by T. S. Powell & Co., dated January 3, 1861, payable in sixty days, and accepted by A. Brown & Co.

On October 16, 1865, citation was served on Key, one of the members of the firm of A. Brown & Co. There was no service upon Brown, who was a citizen of Mississippi, and could not be found in this district. The cause remained pending in this condition for some years, until the death of Key, against whom no judgment was rendered. After the death of Key, Brown also died, and on the 25th of March, 1872, a supplemental petition was filed, in which the fact of the death of Brown, and of the opening of his succession, and the appointment and qualification of Hugh Watt Brown as his executor, were stated, and the averments of the original petition reiterated. Upon this supplemental petition, citation was issued against Hugh Watt Brown, executor, and served on the 28th day of February, 1872.

Brown, the executor, pleaded the prescription of five years on commercial paper, and claimed that it was effectual to bar a recovery in this case.

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To this the plaintiffs replied that the prescription was interrupted by the service of citation on Key on the 25th of October, 1865, and that the prescription was suspended from that time as long as the action was pending against Key, which was until his death, and that deducting the time of the suspension, the action was not prescribed against Brown's executor.

The counsel of Brown admitted that if prescription was suspended during all the time the suit against Key was pending, the action was not prescribed. They claim, however, that the prescription was interrupted, not suspended, by the suit against Key, their view being that when citation was served on Key, the prescription began immediately to run again, and the five years of prescription should be computed from the date of service of citation on Key, not from the time when the suit was abated by the death of Key. If the view of the defendant was correct, it was clear the suit was prescribed.

The court charged the jury according to the view of the defendant's counsel, and it is for the alleged error in so doing that the motion is made for a new trial.

The only question, therefore, presented for the decision of the court is, Did the service of citation on Key interrupt merely, or did it suspend during the pendency of the suit against Key, prescription as to Brown, his copartner?

The articles of the civil code which bear upon this subject are the following:

Art. 2872. * * Commercial partners are bound *in solido* for the debts of the partnership.

Art. 2097. A suit brought against one of the debtors *in solido* interrupts prescription in regard to all.

Art. 3551. "The prescription releasing debts is interrupted by all such cases as interrupt the prescription by which property is acquired, and which have been explained in the first section of this chapter. It is also interrupted by the causes explained in the following articles."

Art. 3552. "A citation served upon one debtor *in solido*, or his acknowledgment of the debt, interrupts the prescription in regard to all the others, and even their heirs," etc.

Art. 3516. There are two ways of interrupting prescriptions; that is, by a natural interruption, or by a legal interruption.

Art. 3518. A legal interruption takes place when the possessor has been cited to appear before a court of justice on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.

The counsel for defendant claim, that their view, namely, that the service of citation upon one of two debtors bound *in solido*, merely interrupts prescription, but does not suspend it as to the other debtor, during the pendency of such suit, is sustained by the French commentators and by the supreme court of Louisiana. In support of their view, they cite the following authorities: 2 Troplong, art. 2242, secs. 535, 536, 553; art. 2250, sec. 687; *Millaudon v. Beasley*, 2 La. An., 916; *Hite v. Vaught*, 2 id., 970; *Dwight v. Brashear*, 5 id., 551; *Richard v. Butman*, 14 id., 144; *Arrowsmith v. Durell*, 21 id., 295; *Walker v. Succession of Hays*, 23 id., 176.

I have examined all the cases cited from the Annual reports and cannot see that they sustain the construction of the code to which the commentary of Troplong seems to give some color, and which counsel for defendants have pressed upon the court. The supreme court of Louisiana does not seem to have distinguished between interruption and suspension of prescription in the construction of the code. On the other hand, there are several cases cited in the brief of plaintiffs which show conclusively, that under the facts of this case, prescription was suspended during the pendency of the suit against Key.

In *Wilson v. Marshal*, 10 La. An., 327, the court says: "If prescription be interrupted by suit, the interruption continues during the pendency of the suit."

The court further says (p. 331): "The effect of the former suit, then, was to interrupt in 1836, the prescription which commenced to run in 1831. And it was impossible for prescription to run whilst the suit was pending. "Ce nest pas seulement pour tout le temps antérieur à la demande, que cette demande interrompt la prescription, c'est aussi pour tout le temps que durera

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l'instance; en soit qu'une prescription nouvelle ne pourra pas recommencer contre le demandeur avant le jour où sera rendu le jugement par lequel cette instance se terminera." Marcadé de la Prescription, 124.

"So, if a new prescription begins to run from the day of the dismissal of the former action in 1843, the requisite period of ten years had not elapsed when the plaintiff instituted her present demand in 1852."

In *Ferguson v. Glaze*, 12 La. An., 667, the suit against the principal on a bond, dated in 1837, was commenced in 1841, was litigated until 1850, when judgment was rendered. Suit was commenced against the surety in 1851. He pleaded the prescription of ten years. The court says (p. 668): "Proceedings were commenced against the principal debtor within about three years of his appointment and interruptedly prosecuted until 1850. This interrupted the prescription as to the surety."

In *Barrow v. Shields*, 13 La. An., 57, the court says: "Again, it is clear that prescription cannot be interrupted until it has begun to run. If, however, a suit be instituted upon a note before it is due, and pending the suit the note matures and is protested for nonpayment, prescription of that note is interrupted so long as the suit lasts, after maturity, even if the suit be ultimately dismissed upon an exception of prematurity. The rule is: "*Actiones quæ tempore pereunt, semel inclusæ judicio, salvæ permanent.*" Marcadé Prescription, Art. 2248.

In *Speake v. Barrett*, 13 La. An., 479, the court says: "Defendant is sued upon a note signed by 'Barrett & Culbertson in liquidation.' There was judgment for defendants, and plaintiffs have appealed. Plaintiff, in 1852, obtained judgment in another suit against Culbertson, and seeks now to hold Barrett liable. The plea of prescription for five years has been made. It cannot be sustained, because prescription was arrested by the suit against Culbertson. Barrett and Culbertson, being commercial partners, are bound *in solido*, and a suit brought against one of the debtors *in solido* interrupts prescription with regard to all."

So in *Richard v. Butman*, 14 La. An., 144: "Where a suit is brought against the surety, who is bound *in solido* with the drawer of the draft for its payment, prescription is thereby inter-

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rupted as to the principal debtor; it will commence to run again from the date of the judgment against the surety."

These rulings of the supreme court of this state seem to be in accord with the spirit of the laws of prescription or limitation.

The theory of these laws is, that the debt sued for has been paid and the evidence of its payment lost. Now, when two persons are jointly bound, and suit is brought against one to enforce the debt, no presumption ought to arise in favor of the other debtor that the debt has been paid. This very case affords a good illustration of this rule. The suit was actually brought against both Key and Brown. Key is sued, but Brown, the other solidary debtor, by keeping out of the jurisdiction of the court, manages to escape service of citation. Now, while the plaintiff is pressing his suit against one of the joint debtors, and is ready to serve citation on the other as soon as he comes within the jurisdiction of the court, ought the one not served to be allowed to claim that during all this time the prescription has been running, and when five years have elapsed, say that the presumption of law is, that the debt has been paid? Clearly this would not be in accordance with the spirit of the law of prescription.

I am, therefore, of opinion that the court erred in charging the jury that the suit against Key merely interrupted, but did not suspend prescription as to Brown.

For this error, the verdict and judgment must be set aside, and a new trial granted.

MYERS & LEVY VS. EXECUTOR OF A. D. D'MEZA.

A creditor of a succession claimed title to a part of the proceeds of a life insurance policy, on the ground that the policy had been pledged to him to secure a debt due him from the testator, but his claim was rejected by the court, on the ground that there had been no delivery of the pledge: *Held*, that this decision was no bar to a bill in equity to enforce a specific performance of the contract to deliver the pledge and for a decree for so much of the proceeds of the policy as might be necessary to pay the complainants' claim.

IN EQUITY.

Heard upon bill and plea in bar.

Myers & Levy vs. Executor of D'Meza.

The case made by the bill was as follows: The complainants, during the lifetime of D'Meza, advanced to him the sum of \$3,524, on the condition that he would assign to them a certain policy of insurance on his life for \$5,000. D'Meza did indorse an assignment on the policy, but died before delivering the policy to complainants. His executor, instead of complying with the contract of his testator by delivering the policy to complainants, collected the money due thereon from the insurance company, and refused to pay the same to complainants. So much of the amount collected as was necessary to pay the sum advanced by complainants to the testator was, by the order of the probate court, kept separate from the other assets of the succession.

The prayer of the bill was for a specific performance of the contract to assign the policy, and for an order enjoining the executor from paying out said money, or mingling it with other funds of the succession, until the final decree in this case, and that said executor might be ordered to pay over said \$3,524 to the complainants.

To this bill the defendant filed a plea to the effect, that on an opposition to the provisional account and tableau of distribution filed by him in the probate court, in his said capacity of executor of the succession of D'Meza, the said complainants did claim the same thing, founded on the same cause of action as that demanded of defendant in this case, and judgment was rendered dismissing said opposition, which on appeal to the supreme court of Louisiana was affirmed. In other words, the defendant claimed that the question raised by this litigation had been decided by a court of competent jurisdiction, in a proceeding between the same parties, and that such decision was a bar to suit.

Messrs Harry T. Hays and J. H. New, for complainant.

Messrs. A. Voorhies and W. Voorhies, for defendant.

Woods, Circuit Judge. The proof to support the plea is a certified transcript from the record of the probate court of the parish of Orleans, of the opposition of the complainants, Myers & Levy, to the provisional tableau of the defendant, as executor of A. D. D'Meza, and the decree of the supreme court rendered on appeal.

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The provisional tableau to which their opposition was made shows that Myers & Levy were placed in the same as ordinary or general creditors.

The opposition to this tableau represented that opponents had a special lien on said policy of \$5,000, to secure the payment of their debt, and prayed that they be declared to have a privilege upon said life policy, or the funds received thereon, and that the executor be ordered to pay the opponents said sum of three thousand, five hundred and and twenty-four dollars.

It seems to me quite clear that a judgment that the complainants in this case had no lien or privilege on this fund does not bar them from setting up an absolute title to the policy, or to a part of its proceeds.

It is plain from the opinion of the supreme court, that the claim of the complainants to a specific performance of the contract of D'Meza, to transfer to them the policy, has never been adjudicated upon.

The supreme court, in affirming the judgment of the probate court, dismissing the opposition to the tableau, say: "Whether opponent's remedy were an action to enforce the verbal contract, with regard to the policy, or a suit for breach thereof, it is unnecessary to decide in disposing of this case. But it is proper to remark, that a contract or promise to transfer or deliver a collateral to secure a debt resulting from the payment by the indorsers of notes indorsed for accommodation, gives no privilege or pledge upon the collateral, not transferred or delivered in pursuance of said contract or promise." *Succession of D'Meza*, 26 La. An., 35.

It appears from this as well as from the opposition to the tableau, that the opponents were setting up a claim to the fund as to a thing pledged. The case went against them, because it appeared that the thing which was claimed as a pledge had never been delivered. On this ground alone the court decided against them. Can there be any doubt that a decision of that controversy does not bar the complainants from praying a specific performance of the contract to deliver the pledge? It is clear, that this would be an entirely different issue, and would not be decided by a judgment, finding that the pledge had never been delivered.

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To ascertain what is demanded in a particular suit, in order to determine whether it is a bar to another suit brought, resort must be had to the prayer of the petition. *Slocomb v. Lizardi*, 21 La. An., 355.

The prayer of the opposition to the tableau, and the prayer of the bill in this case, differ in the relief sought, and the title to the relief sought is different in the two cases.

But the defendant says, that when a party has brought suit upon a particular title, and has been defeated, he cannot afterwards bring another suit for the same thing upon another title, unless he acquired such title since the former demand. In support of this proposition he cites the cases of *Williams v. Close*, 12 La. An., 878 and *Schaffer v. Scuddy*, 14 id., 576.

But these authorities do not settle the question raised by the plea in bar. It may well be held, that if a plaintiff has two titles to a thing, one derived from A. and the other from B., and he brings suit for the recovery of the thing to which his titles relate, and offers in evidence only the title derived from A., and loses his case, he cannot afterwards bring another action and set up the title derived from B. The reason is, that he might have used both titles in his first suit. But in this case, the complainants having claimed in the probate court, to have a pledge of the policy, could not at the same time set up an absolute title. Evidence to sustain title would not have been pertinent to the issue and would have been excluded. In fact, the probate court would not have had jurisdiction of a suit for the specific performance of the contract. Code of Pr., art. 126.

I am of opinion, that the controversy presented by the bill in this case, has never been passed upon, and it would be depriving the complainants of their day in court upon it, to hold them concluded by the proceedings in the probate court. The finding of this court must, therefore, be against the plea of defendant.

Chamberlain vs. Stanton.

JULIA L. CHAMBERLAIN et al. vs. HULDAH L. STANTON et al.

1. During the late war between the United States and the insurgent states, a quantity of cotton was seized in one of the insurgent states by an officer of the government, under authority of the captured and abandoned property act, was sold, and its proceeds paid into the treasury. *Held*, that the question whether or not the cotton was in fact captured or abandoned property was not open to litigation in the courts.
2. When parties not entitled to said proceeds, within two years after the suppression of the rebellion, brought a fraudulent suit in the court of claims to recover the same from the United States, and, by means of false allegations, false testimony and fraud, recovered judgment and received said proceeds from the treasury, a bill filed by the real owners against such persons, more than two years after the suppression of the rebellion, praying for a decree against them for the amount of said proceeds, was dismissed on demurrer for want of equity.

IN EQUITY.

Heard on demurrer to the bill.

Messrs. T. J. Semmes and George S. Sawyer, for complainants.

Messrs. D. C. Labatt and J. Aroni, for defendants.

Woods, Circuit Judge. The case made by the bill is as follows: The complainants say that during the late war between the United States and the states in rebellion, they were the owners of one hundred and ninety-six bales, and one-half a bale of cotton; that during the war the cotton was seized by a subordinate officer of the United States, without orders from any competent authority; the cotton was sold as captured or abandoned property, and its proceeds, amounting to \$51,969, paid into the treasury of the United States; that the cotton was never in fact captured or abandoned property; the United States never acquired any interest in it or its proceeds, but acted in the matter simply as an ordinary depositary or bailee of this specific fund for the benefit of the true owner.

The bill further alleges that the defendants, having no title to said cotton, nevertheless prosecuted a suit for the proceeds thereof against the United States in the court of claims, and by means of false allegations, false testimony and fraud, on the 7th day of

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March, 1870, recovered a judgment for said proceeds, and the amount thereof was paid to them by the officers of the treasury of the United States.

The prayer of the bill is for a decree against the defendants for the said sum of \$51,969, the proceeds of said cotton received by the defendants, and five thousand dollars for special damages sustained by complainants by reason of the premises.

To this bill, defendants have filed a demurrer for want of equity. On this demurrer the cause has been argued and submitted.

The complainants have made no case for the intervention of this court.

According to the averments of the bill, the proceeds of this cotton found their way into the treasury of the United States as the proceeds of captured or abandoned property. Whether the cotton was really captured or abandoned is not now an open question. There was but one way of recovering the money after it had been paid into the treasury as such, and that was by bringing suit in the court of claims. See act of March 12, 1863, 12 Stat., 820.

The statute declares, that "any person claiming to have been the owner of any such abandoned or captured property may at any time, within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, may receive the residue of such proceeds after the deduction of any lawful expenses attending the disposition thereof," etc.

The law never contemplated, that a party claiming to be the owner of captured or abandoned property might recover the proceeds thereof after his claim was barred by the limitation of the statute, or without proving his ownership and loyalty to the satisfaction of the court of claims, by bringing suit therefor against a party who had, by fraudulent practices, received said proceeds from the United States treasury.

If the averments of the bill are true, the United States is entitled to the proceeds of the cotton claimed by complainant.

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The title of the United States became absolute upon the expiration of two years from and after the close of the rebellion, unless suit therefor was brought within that time by the real owner. According to the bill no such suit was brought, and the right of the real owner was forever cut off. The fact that some person, not the real owner, has by fraud and perjury cheated the United States out of the proceeds of the cotton, does not confer any new rights upon the former owner of the cotton.

If the defendants have fraudulently got from the treasury of the United States, money which did not belong to them, the United States has a right of action to recover the same, but the complainants have no such right, and they cannot acquire any such right by adopting the frauds and perjuries of the defendants.

Demurrer sustained.

FRANK WATSON VS. ELLA F. BONDURANT et al.

Where a citizen of one state filed a petition in a court of the state of which he was a citizen, against a citizen of another state, to restrain the execution of a judgment obtained in the state court by the latter against the former, such cause was removable to the federal court under the act of March 3, 1875, notwithstanding the fact, that the federal courts were prohibited by section 720, revised statutes, from granting an injunction to stay proceedings in a state court.

IN EQUITY.

Heard upon motion to dissolve injunction. The case was commenced in the district court for the parish of Tensas, and was removed to this court under the act of March 3, 1875, being the "act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts and for other purposes." (18 Stat., 470.)

The case belonged to the equity side of the court

The defendant having recovered in the parish court a judgment against Albert Bondurant, John Bondurant and Horace

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Bondurant, which was declared to be executory and ordered to be executed on certain lands, in the judgment specifically described, a *fieri facias* was issued on said judgment and put in the hands of the sheriff of Tensas parish, who was about to execute the same by seizing and selling the property described in the judgment, when the complainant in this action, claiming to be the owner and in possession of the said lands, filed his petition in the district court of the parish, praying an injunction to restrain the plaintiffs in the judgment, and the sheriff from seizing and selling the said property on the writ of *fieri facias* aforesaid.

The state court allowed the injunction, and the defendant being, as she claimed, a citizen of Mississippi, and the complainant a citizen of Louisiana, removed the cause to this court and moved to dissolve the injunction allowed by the state court. This motion was met by the objection, that the cause was improvidently removed to this court, and, therefore, this court had no jurisdiction to dissolve the injunction or take any other order in the case except to remand it to the state court.

Messrs. Samuel R. Walker and C. L. Walker, for the motion.

Mr. E. T. Merrick, *contra*.

WOODS, Circuit Judge. The main controversy arising on this motion is, whether the case is one which can be properly removed from the state court to this court. The defendant appears very clearly to be a citizen of the state of Mississippi, and the complainant a citizen of the state of Louisiana. The case is a suit of a civil nature and of equitable cognizance. It therefore falls expressly within the terms of section 2 of the act of March 3, 1875. But counsel for the complainant say, that the purpose of the suit being to procure the allowance of an injunction to stay proceedings in a state court, it does not belong to the class of cases that can be removed, because a court of the United States is forbidden by section 720, revised statutes, to grant such an injunction.

As the act of March 3, 1875, is broad enough to embrace this case, providing as it does in section 4, that all injunctions had in the suit before its removal shall remain in full force and effect until dissolved or modified by the court to which the suit

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shall be removed, and as the act makes no exception of cases brought in a state court to enjoin proceedings in a state court, and, finally, as the act of 1875 is subsequent in date to the revised statutes, I am of opinion, that the case is one properly removeable, and that it has been properly removed into this court.

I am not, however, as yet satisfied, that the injunction ought to be dissolved. The ground on which the dissolution is urged is, in effect, that the petition does not make a case for the writ of injunction. It seems to me, that the averments of the petition, uncontradicted as they are by this motion, are sufficient to show that the *feri facias* ought to be enjoined. I will, therefore, suspend action on the motion until the defendant either answers the bill or makes such further showing as will justify the court in granting the motion.

HENRY W. BENJAMIN vs. CHARLES CAVAROC et al.

1. A mortgage on real estate to secure a debt executed by public act according to the law of Louisiana, although it imports confession of judgment, may be enforced by suit in equity.
2. The fact that there is a statutory remedy in Louisiana on such a mortgage does not oust the jurisdiction of a court of equity to enforce it.
3. Where, under the jurisprudence and laws of a state, want of privity is not an obstacle to the enforcement by one person of a contract made for his benefit by another person with a third person: *Held*, that the equity courts of the United States, sitting in such state, will enforce such a contract at the suit of the beneficiary.

IN EQUITY.

Heard on demurrer to the bill.

The case made by the bill was substantially as follows: The Louisiana Cotton Manufactory, a body corporate of the state of Louisiana, executed certain bonds with interest coupons attached, and to secure the payment thereof at maturity, granted a mortgage by authentic act before a notary public. Complainant was the holder of certain of said bonds with coupons annexed, and some of his coupons had matured and were due and unpaid.

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The bill further alleged that before the bringing of this suit, the said mortgage had been enforced by executory process in a state court at the suit of another holder of certain of said bonds and coupons, and the mortgaged property had been sold by the sheriff to the defendant, Charles Cavaroc; that out of the purchase price a certain specified sum was paid by Cavaroc to the sheriff in cash, and the remainder was retained by him, to be applied under the stipulations in the sheriff's deed, and, according to law, to the payment and satisfaction *pro tanto* of the bonds and coupons, other than the matured coupons held by the plaintiff in the proceedings in the state court; that the residue of the purchase price so retained by Cavaroc was insufficient to satisfy said bonds and coupons except to a certain extent which is specifically stated; and that to this extent, the property remained affected in Cavaroc's hands, by the mortgage and that he became, by virtue of the premises, personally liable to that extent to the respective holders of the said bonds and coupons, and the precise amount alleged to be so due by Cavaroc on each of said bonds and coupons was specifically stated in the bill.

It was further alleged that subsequent to the purchase by Cavaroc, he entered into a certain written contract or agreement with the other parties, who are made defendants, wherein it was recited that he had purchased said property for the other defendants, and that the same was thereby transferred to them in certain respective portions which were specifically stated, and that in said contract it was stipulated by and between Cavaroc and the other defendants that the latter should assume and pay to the holders respectively of the bonds and coupons outstanding ratably, in proportion to their respective interests in the property, the amounts for which it was averred the said Cavaroc had become personally liable as aforesaid; the said assumption constituting a part of the consideration of the said transfer from Cavaroc to the other defendants. It was averred that by reason of the said alleged transfer, and the stipulation between Cavaroc and the other defendants, the latter became personally bound and liable to be called upon in a court of equity to pay and satisfy ratably, and in proportion to their alleged respective interests in the property, the said outstanding bonds and coupons to the same

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extent as the said Cavaroc was alleged to have become personally liable, and the precise sums for which each of the said defendants had become so personally liable were set forth.

The bill prayed for the sale of the property under the mortgage upon such terms as to cash and credit payments as might correspond with the dates of the maturity of the bonds and coupons, and for a personal decree against the defendants respectively for specific sums of money, according to the averments of the bill.

To this bill the State National Bank and the firm of Vincent & Co. demurred, and assigned as grounds of demurrer:

1. That there was no equity in the bill, and if plaintiff was entitled to any relief at all as against the defendants, on the grounds set forth in his bill, he had a plain, adequate and complete remedy at law.

2. There was no privity of contract between the complainant and the defendants who demur.

Messrs. Thomas J. Semmes and Robert Mott, for complainant, cited *De Brueys v. Freret*, 18 La. An., 80; *Landry v. Landry*, 12 id., 167; Code of Pr., art. 732; *Walker v. Dreville*, 12 Wall., 442; *Thompson v. Railway Companies*, 6 id., 137; *Hersey v. Torbett*, 27 Penn. St., 418.

Mr. Henry B. Kelly (with whom was *Mr. James McConnell*), for defendants.

I. The mortgage on which the rights of complainant are founded is a Louisiana mortgage, and was granted by authentic act before a notary. It imports confession of judgment, and, in default of payment by the debtor, entitles the creditor to instant execution by writ of seizure and sale against the property, on simple petition and without citation. Code of Pr., arts. 732, 733 and 734; Loret *Elements de la Science Notariale*, 377; *Succession of Tete*, 7 La. An., 96. It is therefore an instrument entirely different in its effect from an English mortgage.

The remedies appropriate to the enforcement of the rights of a mortgagee, under a Louisiana mortgage, are not equitable remedies in any sense, but statutory and code remedies.

The chancery jurisdiction of the federal courts is the same in all the states, and the rule of decision is the same in all; its remedies are not regulated by the state practice. *United States v. How-*

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land & Allen, 4 Wheat., 108; *Dodge v. Woolsey*, 18 How., 347; *Barber v. Barber*, 21 id., 583; *Cropper v. Coburn*, 2 Curtis, 465.

With regard to the statutory remedies, unknown to either the common law or equity system of England — such, for instance, as the remedies on a Louisiana mortgage, all of which are statutory, and, like the contract upon which they are based, unknown to either system — they are to be enforced by actions at law and not by suits in equity. *Parsons v. Bedford*, 3 Pet., 434.

II. There is no privity between the complainant and the defendants who demur, and therefore this suit cannot be maintained against them. 1 Chit. Gen. Pr., 336; *Tweddell v. Tweddell*, 2 Brown's Ch. Cas., 101; *Woods v. Huntington*, 3 Ves. Jr., 129.

Woods, Circuit Judge. A very learned and elaborate brief has been filed by counsel for defendants who demur, to show that a mortgage like the one referred to in the bill, executed according to the law of Louisiana, is not such a mortgage as is recognized by equity jurisprudence, but is a public act before a notary which imports confession of judgment and that the remedy upon it is statutory and at law, by writ of seizure and sale.

There is no question that the mortgage mentioned in the bill was executed to secure a debt evidenced in part by the bonds held by complainant. It was a security for a debt. A suit upon the bonds at law would not give adequate relief because the plaintiff could not in such a suit assert his prior lien over other ordinary judgment creditors. One of the main purposes of the suit is to enforce a lien upon property. This cannot be done by a court of law which simply renders judgment for the amount due plaintiff and leaves him to make his money out of the property of defendant by writ of *fiery facias*.

It is said, however, that the plaintiff has a statutory remedy by seizure and sale, to which he might have resorted. But the court could not have granted an order of seizure and sale in this case, because the writ can only issue where the evidence submitted to the court is authentic and makes full proof of every allegation of the petition. *De Brueys v. Freret*, 18 La. An., 80; *Landry v. Landry*, 12 id., 167; Code of Practice, art. 732. Complainant holds no such evidence against any of the defend-

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ants except Cavaroc. The proof against the others is an agreement under private signature.

But the fact that a state legislature has conferred upon the state courts the jurisdiction to enforce equitable rights by a statutory proceeding does not oust the equitable jurisdiction of the United States courts. That cannot be interfered with in any degree by state legislation. *Bennett v. Butterworth*, 11 How., 674, 675; *Thompson v. The Railroad Companies*, 6 Wall., 137; *Case of Broderick's Will*, 21 Wall., 520; *Noyes v. Willard*, 1 Woods, 187.

But it seems that the very question raised by the first ground of demurrer is settled adversely in the case of *Walker v. Dreville*, 12 Wall., 440. That case went up from this court. It was a petition in which complainant set out that defendant was indebted to her in the sum of \$5,492, which sum was secured by mortgage, and the prayer was that defendant be condemned to pay the amount so alleged to be due, and that the mortgaged premises be adjudged and decreed to be subject to the payment of said debt, interest and costs. The judgment or decree of the court was in accordance with the prayer of the petition. The case was taken to the supreme court of the United States by writ of error, and the writ of error was there dismissed on the ground that the case belonged to the equity side of the court and should have been brought up by appeal.

2. The second ground of demurrer is want of privity between complainant and defendants who demur.

Under the jurisprudence of this state this want of privity would not be an obstacle to a suit in a court of the state to require the defendants to perform a contract made by them for the benefit of a third person not a party to the contract. Art. 35, Code of Practice.

By this article the liability to suit of the person thus contracting is expressly created, and the right to sue is also given to the person for whose benefit the contract is made. In other words, there is an obligation created in favor of the beneficiary of the contract against the person making the contract, although the beneficiary is not a party to the contract. Can this court enforce this liability? The question seems to be distinctly answered by

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the supreme court of the United States in the *Case of Broderick's Will*, 21 Wall., 520, where the court says: "Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the circuit courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the circuit courts as well as by the courts of the state. * * * Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

This court has jurisdiction of this case to enforce a lien upon property to which the defendants claim title. They are therefore proper and necessary parties. The court having the defendants properly before it will proceed to do complete justice by enforcing directly against them the liability which they incurred by entering into the contract with Cavaroc or with the sheriff for the benefit of the complainant and others.

Demurrer overruled.

In re BECKET.

1. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the court, the bankrupt is thereby discharged only from the claims of the creditors whose names, addresses and debts are placed on the statement produced at the meeting of creditors.
2. In such a case, no discharge granted by the court is necessary or proper.

A creditor of the bankrupt applied to the circuit judge, during a vacancy in the office of district judge, for further time to file specifications of his grounds of opposition to the discharge of the bankrupt. The application was resisted by solicitors for the bankrupt, on the ground that the bankrupt had proposed a composition to his creditors, which had been accepted at a meeting of the creditors and approved by the court, in compliance with the provisions of the act approved June 22, 1874.

Mr. J. Ward Gurley, for the motion.

Mr. Thomas P. Clinton, contra.

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back did on the same day, with intent to defraud the United States, remove from his distillery to a place other than the distillery warehouse, twenty thousand gallons of distilled spirits, on which the internal revenue tax had not been paid.

The second count was similar to the first, and laid the offense as having been committed on the first day of April, 1874.

The indictment was returned into court by the grand jury on April 8, 1876. Counsel for defendants claimed that the prosecution was barred. On this point the court charged the jury as follows:

Messrs. J. R. Beckwith, U. S. Attorney, and *John H. New*, Associate U. S. Attorney, for the United States.

Messrs. W. H. Hunt, *T. J. Semmes*, *L. A. Sheldon*, *W. R. Whitaker* and *J. D. Rouse*, for defendants.

Woods, Circuit Judge. It is claimed for defendants that this prosecution is barred by the statute of limitations. Counsel for defense say that the conspiracy is alleged in the indictment to have been formed on the 8th of April, 1874; that the proof shows that if there was any conspiracy at all, the date laid in the indictment must be the correct one, and that under the statutes of the United States the prosecution is barred if not commenced within two years, and as the indictment was not returned into court until April 8, 1876, more than two years had elapsed between the offense and the finding of the indictment, and the prosecution therefore comes too late.

The provisions of the revised statutes bearing upon this question are as follows: Section 1044 declares: "No person shall be prosecuted, tried or punished for any offense not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within two years after the offense is committed."

Section 1046 provides: "No person shall be prosecuted, tried or punished for any crimes arising under the revenue laws or the slave trade laws of the United States, unless the indictment is found or the information instituted within five years after the committing of such crime."

The ground taken by the defense is that section 5440, on

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which this prosecution is based, is found in the revised statutes under the general title, "Crimes;" that the offense made punishable by it is conspiracy, and not the actual defrauding of the revenue; that consequently this is not a prosecution under the revenue laws of the United States, and therefore falls under section 1044, and is barred in two years.

Is this position tenable? This depends upon the answer to the question whether section 5440 forms a part of the revenue laws of the United States. This section is taken, as appears by the marginal note, from section 30 of the act of March 2, 1867, and is a reproduction of that section in letter and spirit. (14 Stat., 484.) This act is entitled "An act to amend existing laws relating to internal revenue, and for other purposes," and is devoted to the subject of internal revenue. It contains amendments of existing internal revenue laws, some new provisions, which all refer to the internal revenue, and in addition it contains section 30, and nothing more.

Now when we find that section 30 of this act punishes a conspiracy to defraud the United States, and is found embedded in a law devoted exclusively to the subject of internal revenue, the conclusion is inevitable that it was at the time of its enactment a part of the revenue laws of the United States. Has it ceased to be a part of the revenue laws by its collocation in the revised statutes?

This question is answered in the negative by section 5600 of the revised statutes, which declares: "The arrangement and classification of the several sections of the revision have been made for the purpose of more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed."

In my judgment, therefore, section 5440, on which this prosecution is based, is a part of the revenue laws, and prosecutions under it are not barred until the expiration of five years, as provided by section 1046. As the distillery of Fehrenback was not put in operation until January 12, 1874, and if there was any conspiracy, as charged in the indictment, it must have been entered into at or about that time, you need not trouble yourselves

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about the statute of limitations. Upon the conceded facts of the case, and upon the law as I have given it you, the defense that the prosecution is barred cannot be successfully made in this case.

WILLIAM ROBINSON vs. JOSEPHINE A. GALLIER et al.

1. Where two persons perish in the same event, there are no presumptions of law as to survivorship unless prescribed by positive enactment.
2. The presumptions of law as to survivorship prescribed by the civil code of Louisiana, where two persons perish in the same event, only apply in the absence of circumstances of the fact, and where the persons are respectively entitled to inherit from one another.
3. Where a male sixty-eight years of age, and a female forty-four years of age, respectively entitled to inherit from one another, perish in the same event, the presumption raised by article 939 of the civil code of Louisiana, in the absence of circumstances of the fact is, that the male perished first.
4. Where the title of the plaintiff who seeks to disturb the possession of others depends on the fact that the person under whom he claims survived another, though both perished in the same event, and the case admits of no presumptions of law, the burden of proof is on the plaintiff to establish the fact of survivorship. If it appear that both persons perished at the same instant, or if it shall be impossible to declare from the evidence which perished first, the plaintiff must fail.
5. But the fact of such survivorship does not require any higher degree of proof than other facts in a civil case.

ACTION AT LAW:

Tried by Woods, J., assisted by a jury.

The suit was brought by the heirs at law of Mrs. Catharine R. Gallier, who was in her lifetime the wife of James Gallier Sr., against the heirs at law of said James Gallier Sr., to recover certain valuable real estate in the city of New Orleans, and \$5,000 in coin.

The undisputed facts in the case were as follows: James Gallier Sr., a citizen of Louisiana, made and executed his last will, by which he devised in fee to his said wife the real estate which was in part the subject of the controversy in this suit, and also \$5,000 in coin. The plaintiffs in this action were the heirs at law of Mrs. Gallier, who was the wife of the testator, and the de-

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fendants were the widow in community and the children of James Gallier Jr., deceased, who was the only child and heir at law of James Gallier Sr. Under the law of Louisiana, Mr. and Mrs. James Gallier Sr. were not entitled to inherit from one another. The defendants were in possession of all the real and personal estate left by the said James Gallier Sr.

Mr. and Mrs. James Gallier Sr. were passengers on the steamship *Evening Star*, which left New York for New Orleans on the afternoon of Saturday, September 29, 1866. There were on board 213 passengers, besides the crew. On the afternoon of Tuesday, October 2, the steamship, when about 180 miles east of the Georgia coast, encountered a gale which, by midnight, became a hurricane. During the night the ship became disabled, fell into the trough of the sea and sprung aleak. About 5 o'clock in the morning of October 3d, she went down. Mr. and Mrs. Gallier Sr. perished. Only twenty-three persons of the passengers and crew survived the disaster, and were saved.

Mr. Gallier Sr. was, at the time of his death, sixty-eight years of age, and his wife was forty-four. He was about five feet ten inches in height, and of rather spare habit. She was a little below the medium height, and weighed 212 pounds.

Article 1697 of the civil code of Louisiana declares that "the testamentary disposition becomes without effect if the person instituted or the legatee does not survive the testator."

It was therefore conceded by counsel for plaintiffs that the legacy to Mrs. James Gallier Sr. in the will of her husband did not take effect and the plaintiffs in this action had therefore no title, unless Mrs. Gallier survived her husband; that the legacy lapsed if both Mr. and Mrs. Gallier died at the same moment, or if Mr. Gallier survived his wife.

The only issue submitted to the jury was, whether or not Mrs. Gallier survived her husband.

To sustain the issue on their part, the plaintiffs offered evidence tending to show, in addition to the facts above recited, that Mr. Gallier was, at the time of their death in feeble health, and that his wife was of strong constitution and in robust health.

The plaintiffs also adduced in evidence the depositions of E.

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A. Van Sickle and Frank Girard, both of whom were survivors of the loss of the Evening Star. The former testified, that he first saw Mr. and Mrs. Gallier on deck as the Evening Star steamed down the bay of New York. He asked the purser, Mr. Allen, who they were, and was told by him, that they were Mr. and Mrs. Gallier, and he afterwards heard the lady addressed as Mrs. Gallier. He never saw Mr. Gallier after five o'clock, P. M., of the second day of October, the day before the steamer was lost.

About an hour after the ship sunk, Van Sickle says, that having been in the water for that length of time, he neared the life boat, and then saw Mrs. Gallier also in the water. She caught hold of him, and when they reached the life boat he helped her into it. The boat was capsized five times within a very few minutes. Mrs. Gallier was helped into the boat four times, first by witness and subsequently, three times by witness and others. When the boat was capsized the fifth time, Mrs. Gallier was drowned.

Frank Girard testified, that he was an actor by profession, that he was a passenger on the Evening Star on the voyage when she was lost; that he knew Mr. and Mrs. Gallier, having been introduced to them by Capt. Knapp of the Evening Star. He saw Mrs. Gallier for the last time, between half past six and seven o'clock of the morning of October 3, 1866, after the sinking of the Evening Star. She was in the water supporting herself on a piece of timber. She was at the side of the boat in which he was. Almost immediately afterwards he lost sight of her. He further testified, that about two or three o'clock of the morning of October 3d, he saw both Mr. and Mrs. Gallier in their state room. Mr. Gallier was lying in his berth with his eyes closed, and Mrs. Gallier was sitting by his side weeping. He never after that saw Mr. Gallier.

The defendants introduced the evidence of Anthony Mc Mahon, second assistant engineer, Dennis Gannon, waiter, and Alexis Sauza, passenger.

Mc Mahon testified, that after the sinking of the steamer he succeeded in getting into a life boat, the same in which Van Sickle was. That there were three women and only three at

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any time in the boat. Two of these were saved. The third was taken in after the boat was first righted, but she was afterwards lost. She was taken in for the last time after the boat had been capsized three times, and was so exhausted that she could not speak. She could not hold on and was lost out of the boat. She was a woman weighing about one hundred and thirty pounds, about twenty-three years old and of medium size.

Gannon testified that he knew Mr. and Mrs. Gallier, having waited upon them while they were passengers on the Evening Star; that about five minutes before the steamer went down he saw both Mr. and Mrs. Gallier in their state room, he standing and holding to the top of the berth to steady himself, and she sitting or leaning against the side of the state room. After running around to find a life preserver, and getting one, Gannon climbed from the cabin to the hurricane deck through a sky light, and in one or two minutes after, the ship sunk. He did not go to the deck by the stairs, because there were about a dozen persons on them, and he thought he could get up quicker through the sky light. He got in a life boat after the ship sunk but not the same boat in which Van Sickle was. He saw many persons in the water but did not see either Mr. or Mrs. Gallier among them.

Sauza testified that he was saved in the same life boat with Van Sickle. That there were seven men and three women in the boat when he succeeded in getting in. The boat upset and one of the three women, who appeared to be about thirty years of age, thin in flesh and had but little clothing on, was lost. The other two women were saved.

There was some evidence tending to discredit the witness Van Sickle, and also to show that Girard was an actor in a negro minstrel troupe.

Mr. Lionel A. Sheldon, for the plaintiffs, to show the survivorship of Mrs. Gallier, relied in part upon the presumptions of law raised by the civil code of Louisiana. He read the following articles:

“Art. 936. If several persons respectively entitled to inherit from one another happen to perish in the same event, such as a wreck, a battle, or a conflagration, without any possibility of as-

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certaining who died first, the presumption of survivorship is determined by the circumstances of the fact.

"Art. 937. In the absence of circumstances of the fact, the determination must be guided by the probabilities resulting from the strength, age and difference of sex, according to the following rules:

"Art. 938. If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived; if both were above the age of sixty years, the youngest shall be presumed to have survived; if some were under fifteen and some over sixty, the first shall be presumed to have survived.

"Art. 939. If those who have perished together were above the age of fifteen years and under sixty, the male must be presumed to have survived when there was an equality of age or a difference of less than one year. If they were of the same sex, the presumption of survivorship by which the succession becomes open in the order of nature must be admitted; thus the younger must be presumed to have survived the elder."

It was conceded that although the case did not fall within the letter of the last article cited, yet it did within its spirit, and as Mr. Gallier was sixty-eight and Mrs. Gallier only forty-four years of age at the time of their death, if the articles of the code cited were applicable at all, then article 939 raised the presumption that Mrs. Gallier was the survivor.

Mr. Sheldon also argued to the jury that if these presumptions did not apply to the case, the evidence was sufficient to enable the jury to find the fact that Mrs. Gallier survived her husband.

Mr. H. M. Spofford (with whom was *Mr. John A. Campbell* and *Mr. Gustavus Schmidt*), for the defendants:

Those who invoke the aid of a court to disturb others in their possessions must make out their case. The burden of proof is on the plaintiff to establish by evidence the fact that Mrs. Gallier survived her husband.

The artificial rules or legal presumptions established by articles 936, 937, 938 and 939 of the Civil Code of Louisiana do not apply to this case.

It is obvious upon the very face of this legislation that these

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rigid and arbitrary presumptions are exceptional; by the terms of article 937, by which they are introduced, they can be invoked only "in the absence of circumstances of the fact." Such a case might occur where the deceased parties embarked upon a ship which, after proceeding to sea, was no more heard of. But here is a case where "circumstances of the fact" are brought to notice in abundance. We know exactly where the steamship Evening Star perished, and how she perished. We trace Mr. and Mrs. Gallier all through the disastrous voyage, their habits on board, their rising up and sitting down, their positions and relative states of mind and body almost to the very moment when the ship was engulfed; the plaintiffs even attempt to prove something after that, and to show by evidence of eye witnesses that Mrs. Gallier survived Mr. Gallier. There is, therefore, by the very terms of the code, no room for any legal presumption, but the case must be determined by "the circumstances of the fact" under the general rules of evidence, applicable to all cases indiscriminately, that is by the common or unwritten law.

Again, there is another conclusive reason, also apparent upon the text of the code, why these artificial presumptions can find no place in this cause. They were made alone for cases where the commorient persons were "respectively entitled to inherit from one another." So far is this from being the situation of the deceased parties here, that precisely the reverse was the situation. Neither of them was entitled to inherit from the other. Mr. Gallier left a living son who was of course his presumptive heir, and a forced heir to a certain extent. Mrs. Gallier, even if she survived him, was not his heir at all. And, on the other hand, Mrs. Gallier left surviving her, her father (to a certain extent a forced heir), and her brothers and a sister of the half blood, who were her presumptive heirs, and Mr. Gallier, if he survived, was not her heir at all. Nor was there any reciprocity between them. She left no will, but several heirs entitled to inherit from her, of whom he was not one. He left a will instituting his son, James Gallier Jr., universal heir (as he would have been without the will), and charging him with the payment of a particular legacy to his wife. If she had survived

him she would have "been entitled to inherit" nothing from him, she would not have been "called to his succession" (*appelée à la succession*), but would only have received a gift *mortis causâ* out of his estate, of which she would have been in no sense an "heir."

Therefore, the arbitrary presumptions of those articles cannot be invoked in the present case without expunging from the code the limitation of their applicability to cases where the persons perishing together were respectively entitled to inherit from one another. This cannot be done. The articles have been taken almost literally from arts. 720, 721 and 722 of the Code Napoleon. The discussions when those articles were adopted (for they were novel rules, first introduced by that code) show that these legal presumptions were not intended to regulate any cases save where the parties perishing together were each other's presumptive heirs. That they have no application to legatees by last will is settled in France by an overwhelming preponderance of authority; 1 Chabot, Des Successions, p. 22, Com. sur. art. 720, C. N.; 2 Delvincourt, Notes et Explic., p. 21; 20 Merlin, Répert., verbo "Mort," p. 419; Favard, verbo Succession, sec. 1, § 1, No. 6; Zachariæ, t. 1, p. 180, § 85; 2 Massé et Vergé sur Zachariæ, p. 237, No. 3; 6 Duranton, No. 48; Delaporte, Pandectes Françaises, art. 722; Rolland de Villargues, Rep. du Notariat, Suc., No. 27; Vuillaume, Com. du Code Nap., p. 198; 3 Demante, No. 22, *bis*; 2 Ducaurroy Bonnier et Roustaing, No. 401; 4 Troplong, Donations et Test, Nos. 2125, 2126, 2128, 2129; 41 Dalloz Jurisp. Gen. verbo "Suc.," Nos. 54, 55; 3 Marcadé, No. 27; 13 Demolombe, "Successions," No. 112.

To the same effect there are two *arrêts*, one of Bordeaux, 29 Janv., 1849, *aff. Durup*, Dal., p. 50: 2: 180; the other of Paris, 30 Mars, 1850, *aff. Roslé*, Dal., p. 51: 2: 108.

As no proposition is so plain that some ingenious and controversial Frenchman may not be found to dispute it, we find here M. Toullier contending that the presumptions ought to be applied to legatees by last will. He even invents and adds a new legal presumption of his own to apply to the case of commorient twins, and says, if they perish together under fifteen or over

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sixty, the more robust will be presumed to have survived; if between those ages, the more robust will be presumed to have died first. 2 Toullier, No. 75.

It may well be supposed that an author, however brilliant, who indulges in such vagaries as this upon the law of survivorship would have but a slender following. And so he has. Portions of his views have the qualified concurrence of Vazeille, Com. sur art. 720; Maleville, id.; Poujol, t. 1, p. 77, et suiv.; Belost Jolimont sur Chabot; and Teulier, t. 3, No. 119. There are no *arrêts* in favor of these fanciful doctrines. There being no decisions in our own courts upon these articles, they must be presumed to have been adopted into our code with the prevailing construction they received in France, the country of their origin, which restricts the presumptions, not only to cases where there are no circumstances of the fact in evidence, but to cases where the co-deceased persons were heirs to each other. This construction but follows the plain text, and gives effect and meaning to every clause in the articles of the code. Thus, without any presumptions established by law to influence, in the slightest degree, the decision, we are thrown back upon the rule that he who affirms must prove. The plaintiffs, in order to recover, must establish by evidence, of whose weight the jury are the sole judges, that Mr. Gallier perished before Mrs. Gallier. This, it is true, they may prove by direct or by presumptive evidence. Now "presumptions not established by law are left to the judgment and discretion of the judge (in this case the jury), who ought to admit none but weighty, precise and consistent presumptions." C. C., 2288.

In regard to presumptions of this class, or "simple presumptions," as they are sometimes called, it has been held by the supreme court of this state in *Bach v. Cohn*, 3 La. An., 103, that "the known fact on which the presumption reposes must draw with it the unknown fact, as an almost necessary consequence." Under the jurisprudence of Louisiana it is not enough for the plaintiffs to make it merely likely that Mrs. Gallier outlived her husband; they must make it legally certain. This is a general principle as to the *quantum* of proof required of plaintiffs. *Old v. Fee*, 8 Mart., 14; *Skipwith v. Creditors*, 19 La.,

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206; *Wilcox v. Creditors*, 2 Rob., 32. "A party, to recover, must make his claim certain; it is not enough to render it probable." *Mummy v. Haggerty*, 15 La. An., 270; *Fox v. McDonough's Succession*, 18 id., 449; *Carver v. Harris*, 19 id., 122.

In Redf. on Wills, vol. II, p. 158, sec. 3, it is laid down that "where the testator and the legatee, in contemplation of law, die precisely at the same time, there is no vesting of the legacy." "And again," says Redfield (id.), "it failing to be shown by any satisfactory evidence which died first, the decision must be against the party upon whom rests the burden of the proof." And in this, as in all other cases where a person, to recover, has to show that a particular state of things has arisen, "the evidence must be positive," as held by Lord Cranworth, Lord Chancellor, in the case of *Underwood v. Wing*, 19 Beav., 439, and *S. C.*, 4 De G., M. & G., 633. Upon the trial of this case Lord Cranworth invited those eminent common law judges, Mr. Baron Martin and Mr. Justice Wightman, to sit with him, who advised that as to the priority of death, by drowning in that case, "there might be surmise, and speculation, and guess, but we think there is no evidence." Another branch of the same case, under the name of *Wing v. Angrave*, went by appeal to the house of lords, and is reported in H. L. C., vol. 8, p. 182. All the law lords concurred in the views thus summarized by the reporter of the case: "There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.

"Nor is there any presumption of law that all died at the same time.

"The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative."

Woods, Circuit Judge, charged the jury as follows:

I am convinced by the argument which has been addressed to me in your hearing by the counsel for defendants that the presumptions of law as to survivorship prescribed by the civil code

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of this state do not apply to this case. This is not the case of persons respectively entitled to inherit from one another, nor is it a case where, "in the absence of circumstances of the fact," the arbitrary presumptions prescribed by the code can be admitted. You are therefore left to decide the case upon the evidence as it has been submitted to you. You are to determine, if you can from the testimony, whether or not Mrs. Gallier survived her husband. This is the single issue for you to decide. There are no presumptions of law in the case. If the evidence produced by the plaintiffs establishes the fact of survivorship to the satisfaction of your minds, your verdict should be for the plaintiff. But if from the evidence you should be led to the conclusion that Mrs. Gallier perished first, or that both Mr. and Mrs. Gallier died at the same moment, or if it shall be impossible to declare from the evidence, which died first, in either of these cases your verdict should be for the defendant.

The question submitted to you is one purely of fact in the decision of which the court can give you little assistance; I can only lay down some general rules of the law of evidence for your guidance.

In the first place the burden of proof is on the plaintiffs to make out their case. They must prove the survivorship of Mrs. Gallier to your satisfaction or their case fails. But I do not understand that the fact of survivorship requires any higher degree of proof than other facts in a civil case. The plaintiffs have the affirmative of the issue, the burden of proof is on them, and unless the testimony in the case satisfies and convinces your minds you cannot return a verdict in their favor; but if you are satisfied and convinced, you can and should.

You are not to decide the question on mere surmises or conjectures. You are not authorized to dispose of the rights of the parties by mere guessing. There must be proof, either positive or circumstantial, satisfactory to your minds, on which to base your verdict.

You are the sole judges of the credibility of the witnesses and of the weight that ought to be given to their testimony. If a witness has been impeached by proof that in some things not connected with the main facts of the case, he has sworn falsely,

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you would be justified in discarding his evidence, unless he is corroborated by other evidence. If he is corroborated, the fact that he has sworn falsely in regard to other matters is no reason why you should reject the facts as to which he is sustained by other proof.

It has been argued to you that the fact that Girard was a negro minstrel ought to discredit his evidence. I know of no rule of law to justify such a proposition. All men, until some reason to the contrary is shown, are presumed in law to be worthy of belief. The business in which a person is engaged, if it be an honest one, ought not to discredit him, no matter how humble it may be.

You will of course not allow your minds to be influenced by what you may consider the equities of the case. Your duty is simply to determine the question of survivorship. If Mrs. Gallier is shown to your satisfaction to have survived her husband, you will return a verdict for the plaintiffs; if you are not so convinced, you will return a verdict for the defendants.

The jury found for defendants.

PABLO SALA et al. vs. THE CITY OF NEW ORLEANS et al.

1. The charter of a bank authorized it to construct water-works for the city of New Orleans, and declared that after the expiration of thirty-five years, it should be lawful for the city to purchase said water-works on certain prescribed terms, and pay for them in its bonds, and the bank was, on the election of the city to purchase, required to sell on the terms prescribed: *Held* that this charter was a contract with the bank and that any act of the legislature afterwards passed imposing onerous conditions upon the issue of bonds by the city, so far as they might apply to bonds to be issued in payment for the water-works, impaired the obligation of the contract with the bank and was void.
2. Where the contract for the purchase of the water-works was executed and the city got the water-works and paid its bonds to the bank therefor, and the city did not deny its obligation to pay the bonds, nor threaten to do so, the bank could not repudiate the contract of sale on account of any supposed infirmity in the bonds.
3. The city having authority to issue the bonds, they are good in the hands of

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bona fide holders for value, whether the conditions precedent to their issue were observed by the city or not.

4. Therefore, parties holding only a portion of the bonds issued by the city in payment for the water-works could not undertake to repudiate the contract of sale without the consent of all the other holders of such bonds.
5. The ownership of the bonds issued in payment for the water-works did not make the holders thereof stockholders in the bank from which the water-works were purchased.
6. The ownership of stock in an incorporated company does not give the stockholders any title to the property of the company.

IN EQUITY.

Heard on pleadings, proofs and arguments of counsel for final decree.

The case as made by the pleadings and evidence was in substance as follows: The complainants were holders of bonds of the par value of \$116,300, issued by the city of New Orleans, and dated January 1, 1869—known as water-works bonds—and they filed the bill for themselves and all holders of similar bonds who might consent to become parties and contribute to the expenses of the suit. On the 1st day of April, 1833, the legislature of Louisiana passed an act to incorporate the Commercial Bank of New Orleans, and by the same act, conferred on the bank the exclusive privilege of supplying the inhabitants and city of New Orleans with water, from the Mississippi river, by means of pipes, engines, and other machinery. Said act provided, however, that at any time after the expiration of thirty-five years it should be lawful for the city of New Orleans to purchase from said bank the water-works constructed by it, and that said bank should not refuse to sell the works aforesaid, on the terms prescribed by the act.

By said act it was further provided that the price to be paid by the city of New Orleans for the water-works should be fixed by arbitrators, whose decision was to be conclusive, and the price so fixed was to be paid in the bonds of the mayor, aldermen and inhabitants of New Orleans, bearing five per cent. interest, and payable semi-annually, and on such payment being made the water-works were to be delivered to the city.

On the 27th of March, 1868, the city council of New Orleans resolved to purchase said water-works on the terms prescribed by

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the act of 1833. The works were appraised by arbitrators at the price of \$2,000,000, payable in city bonds. In pursuance of said award, the city and the Commercial Bank agreed that the said amount should be paid as follows: As the city was a stockholder in the bank to the amount of a half million of dollars, the city was allowed a credit for that amount on the said purchase price, and an additional credit of \$106,600, that sum being the share of the city as a stockholder in said bank in a sinking fund belonging to the bank. After crediting these sums to the city, there remained a balance of said purchase money of \$1,393,400, payable in city bonds.

On the 19th of January, 1869, the bank, by an act passed before a notary public, sold and delivered the water-works to the city, and the said balance due on the purchase price thereof was paid to the bank in city bonds, having thirty years to run. These bonds were authorized by an act of the legislature, approved July 22, 1868, which simply empowered the city to execute and deliver to the bank the bonds of the city in payment for the balance due on the purchase of the water-works, pursuant to the provisions of the said act of 1833, whenever there should have been an award as prescribed in said act, any law in force to the contrary notwithstanding.

After the passage of the act of 1833, to wit: on February 23, 1852, the legislature passed an act by which the city was prohibited from issuing any bonds or contracting any debt, unless the same should be authorized by the vote of a majority of the qualified electors of the city, and which further declared that no ordinance of the city creating a debt or loan, should be valid unless such ordinance should provide for the full payment of such debt or loan, both principal and interest. (Acts of 1852, p. 42, No. 72.)

Afterwards, by an act (No. 258, approved April 29, 1853, p. 234 of the session acts of 1853), the city of New Orleans was again prohibited from contracting any debt without providing in the ordinance creating the debt, for its full payment. This provision was reenacted by act No. 263, approved March 15, 1855. These acts of 1852, 1853 and 1855, it is alleged, were in full force until long after the issue of said water-works bonds to the bank.

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The resolutions of the city council of New Orleans, providing for the purchase of said water-works, contained no provision for the payment of the principal and interest of the bonds delivered to the bank as the price thereof, and no vote was ever taken on the question of contracting the debt and issuing the bonds.

It was alleged that the bonds issued by the city in payment for said water-works were and are null and void, because the provisions of the acts of 1852, 1853 and 1855, before referred to, were not observed; that the city had no authority to issue said bonds, and therefore paid nothing for the water-works, and obtained possession thereof without consideration; that the city had no power to make the contract of sale, and said contract should be rescinded and annulled, and said water-works declared to be the property of said bank, its stockholders and their assigns or representatives.

The bill further alleged that the said one million three hundred and ninety-three thousand four hundred dollars of city bonds were distributed among the stockholders of the bank in proportion to their stock, but the interest of the city in said bank was balanced by a credit allowed on the purchase price of the water-works, as above set forth. Since the distribution of said bonds, which took place in 1869, the said bank had been deemed by its officers defunct, and there was no board of directors competent to manage its affairs, and no quorum of the late board could be convoked, on account of the death or absence of its members.

It was charged that the city of New Orleans was negotiating for the sale or lease of said water-works, and if such sale or lease was made, that it would work irreparable injury to complainants.

The bonds issued to the bank in payment for the water-works were widely distributed throughout the United States and Europe. The city of New Orleans had paid all interest on said water-works bonds due prior to January 1, 1875, and had paid the interest due January 1, 1875, to all persons who had presented their coupons for payment; but this last named interest was not paid until June, 1875, and the interest due July 1, 1875, and January 1, 1876, had not been paid. The reason for this failure to pay was want of funds to make the payment.

It was claimed that those bondholders who were not stockhold-

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ers in the bank at the time of the distribution of the bonds to the stockholders, were in equity entitled to all the rights vested in the stockholders of the Commercial Bank, who in the first instance received said bonds from the city.

After the failure of the city to pay the interest due January 1, 1875, the complainants requested Jules Labitut, who was the last president of the Commercial Bank, to convoke a meeting of the persons who composed the last board of directors, to take legal steps in the name of the bank to rescind the sale made to the city of the waterworks, and to recover possession of the same, to which Labitut replied that he could not comply, because a quorum of the late board could not be called together, on account of the death of some members and the removal from the state of others.

Several holders of the water-works bonds, whose bonds in the aggregate amount to \$220,000, were made defendants to the bill.

The prayer of the bill was that the city of New Orleans might be enjoined from selling, leasing or hypothecating the water-works, and that a receiver might be appointed to take possession of and conduct the same, collect and disburse the revenues under the order of the court, and hold the water-works until the final hearing of the cause.

The bill prayed for no ultimate disposition of the water-works, nor did it contain any prayer for general relief.

The answer of the City of New Orleans denied that the act of July 22, 1868, by which the city was authorized to issue its bonds in payment for the water-works, was void; denied that the act of February 23, 1852, or the act of April 29, 1853, or the act of March 15, 1855, prohibited the city from issuing such bonds as those issued in payment for the water-works, and averred that these acts were passed long subsequent to the act incorporating the Commercial Bank and authorizing the city to purchase the water-works and issue its bonds therefor, and that the provisions of said last named act were not inconsistent with or repealed by the provisions of the former acts. That the act incorporating the bank was an act which the legislature had the power to enact; that it had never been repealed; that the provision for the sale by the bank to the city of the water-works had all the force and

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effect of a contract, not only between the state and the city but between the bank and the state, which could not be affected by subsequent legislation. The answer denied that the water-works bonds issued by the city were void, but on the contrary averred that they were valid and binding obligations and were received by the bank in full payment of the purchase price of the water-works, and were the identical consideration for which the bank contracted.

The answer further alleged that since the year 1869, when the charter of the bank expired, it has had no corporate existence either in law or in fact; that it has neither officers, board of directors, nor stockholders, and cannot be revived, and no person whatever has the right to represent it; and denied that those holders of water-works bonds who were not stockholders in the bank were in any manner subrogated to the rights of the stockholders who in the first instance received the bonds.

The answer further insisted that there was no equity in the bill and that it ought on that ground to be dismissed.

Messrs. Thomas J. Semmes and Robert Mott, for complainants, who cited *Oneida Bank v. The Ontario Bank*, 21 N. Y., 497; *Tracy v. Talmage*, 14 id., 162; *City of Memphis v. Brown*, 20 Wall., 319; *McCracken v. San Francisco*, 16 Cal., 628.

Mr. B. F. Jonas, City Attorney, for defendants.

Woods, Circuit Judge. As the cause is now submitted for final decree, it is too late to grant that part of the prayer of the bill which asks for a receiver to take possession and charge of the water-works until the final disposition of the case. The only other prayer is that the city may be restrained from selling, leasing or hypothecating the water-works.

The theory of the complainants seems to be that the bonds issued by the city in payment for the water-works, being absolutely void for want of power in the city to issue the bonds and therefore to make the contract of sale, in which the issue of bonds formed a necessary stipulation, the sale was void and the Commercial Bank still remained the owner of the water-works; that the present holders of city water-works bonds are subrogated to the rights and property of the bank, and the city ought to be

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enjoined from any act which would embarrass the title of the bondholders.

In my judgment, the theory of the complainants is unsound.

The act of April 1, 1833, "to incorporate the Commercial Bank of New Orleans," and which constitutes the charter of the bank, with all its material provisions, is a contract between the state and the bank, the obligation of which cannot be impaired by subsequent legislation. *Dartmouth College v. Woodward*, 4 Wheat., 518; *Providence Bank v. Billings*, 4 Pet., 514; *State Bank of Ohio v. Knoop*, 16 How., 369; *Dodge v. Woolsey*, 18 id., 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *The Binghampton Bridge*, 3 Wall., 51; *Allen v. McKean*, 1 Sumn., 276.

As already seen, the charter provided, that at the expiration of thirty-five years, the city of New Orleans might purchase from the bank its water-works at an appraised value, and the bank was at the time specified, and on the terms specified, in case the city elected to purchase, required to sell. And section 42 of the act of incorporation declared, that the amount of the purchase price should be payable in the bonds of the city of New Orleans, bearing interest at the rate of five per cent. per annum, payable semi-annually, redeemable in not less than ten nor more than thirty years.

It seems to me, that the power of the city to issue bonds, in payment of the purchase money of the water-works, was clearly given by the charter of the Commercial Bank. It is just as clear, that the power of the city to buy the water-works and to issue its bonds therefor, was a provision of the charter of the bank, beneficial to the bank, and that it formed a part of the contract of the state with the bank, expressed in the charter of the bank. The state could not take away from the city the power of purchasing the water-works without interfering with the charter of the bank in a material particular.

It seems to me clear, that after the thirty-five years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the water-works, an act of the legislature forbidding the issue of the bonds, or imposing onerous conditions upon their issue, not in force at the date of

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the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank. As soon as the city made its election to purchase, the right of the bank to sell the water works became absolute. The state had agreed, that under such circumstances the city should have power to purchase, and should purchase, and the bank should be compelled to sell, and should, in fact, have the right to sell, and should receive city bonds in payment, which bonds the city was authorized to issue. Any legislation which interfered with these powers and obligations, or any material terms thereof, the state was incompetent to pass. If, therefore, the acts of 1852, 1853 and 1855, were intended to impose conditions upon the issue of water-works bonds, not contained in the charter of the bank, they impaired the obligation of the contract between the state and the bank contained in the charter, and were, therefore, to that extent unconstitutional and ineffectual. The city, therefore, had power to issue the water-works bonds, they are not void, and the superstructure of the complainants, built on the theory that they were void, falls to the ground.

Another and conclusive answer to the complainants' claims is this: The bank agreed to take the city bonds for its water works. The contract was executed and the exact consideration paid. The bank got the bonds and the city the water-works. The city has never repudiated the bonds or denied its obligation to pay them, principal and interest, and does not propose to repudiate them. Until it does so, the bank cannot rescind the contract and ask to have its property restored.

Another difficulty with the complainants' case is, that the bonds are valid and binding on the city in the hands of *bona fide* holders, whether the conditions precedent to their issue were observed or not. *Van Hostrup v. Madison*, 1 Wall., 291; *Gelpcke v. Dubuque*, 1 id., 175. The city cannot, therefore, repudiate the bonds held by *bona fide* purchasers, if it would, and all holders are presumed to be *bona fide*.

The complainants and the defendants, who concur in the objects of the bill, only hold \$400,000 of the water-works bonds, and there are nearly a million of other water-works bonds scattered over the United States and Europe. How does this court know

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whether this large majority of bondholders is willing to take back the water-works and surrender their bonds? The bonds are good in their hands and binding on the city.

Ought the possession of the city of its water-works, or its title thereto, to be interfered with until the bondholders express, at least, a willingness to give up the city's bonds which were paid as the purchase price of the property? Are not the parties to this bill assuming a good deal, when they, representing \$400,000 of bonds, undertake to repudiate the contract of sale without consulting the holders of the other \$900,000 worth of bonds, constituting a large majority of the whole? Suppose the holders of these \$900,000 of bonds prefer their bonds to the water-works, and hold on to their bonds and insist on payment as they have the right to do, where does this court get the power to rescind their contract for them, and compel them to give up their bonds and take the water-works against their protest? It must also be borne in mind, that the city itself is an owner of the water-works to the extent of \$606,000 in \$2,000,000. Are we to pay no attention to this circumstance in passing upon the rights of the city?

But there are other difficulties in the way of any relief on this bill. The great mass of bondholders were not, at the date of the purchase, stockholders in the Commercial Bank, and never were. They hold city bonds, not stock in the Commercial Bank. And if the city had repudiated the bonds the day after their issue, that would not have made the holders of city bonds stockholders in the bank. And if it had that effect, neither they nor the original stockholders would have acquired any rights in the property of the Commercial Bank. The ownership of stock does not give the stockholders any title to the property of the corporation. *Morgan v. The Railroad Co.*, 1 Woods, 15.

The water-works belong either to the city of New Orleans or to the Commercial Bank. But the latter is dead beyond resuscitation. It expired in 1869 by the terms of its charter, when it sold out its water-works. It may have made a bad sale but a sale was made. The bank got precisely what it contracted for. It has used the consideration paid for its property by distributing it among its stockholders, and having thus accomplished the purpose of its

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creation, it ceased to exist. It has been dead seven years. It has no charter, no officers, no board of directors, no property, no stock, no stockholders. This court cannot breathe into it the breath of life, and the relief contemplated by the bill can be granted only by the resuscitation of this defunct corporation.

I do not think the complainants are entitled to any relief upon the case made by the bill, least of all the relief which they ask.

The bill must be dismissed at complainants' costs.

THE UNITED STATES VS. SAMUEL W. HAMMOND et al.

1. Although the provisions of section 820 of the U. S. Rev. Stats. were not in force on the first day of December, 1873, and that section seems to have been included in the revision by mistake, it has nevertheless been reenacted by congress, and is a part of the law of the land.
2. The presence of one disqualified person upon the panel of a grand jury vitiates the indictments found by it.
3. Section 820 of the U. S. Rev. Stats. prescribes an absolute disqualification for the causes therein mentioned of grand and petit jurors, and it does not rest in the discretion of the court or with the United States attorney to decide whether the rule of disqualification shall be applied or not.
4. The federal courts on questions of criminal practice, not regulated by act of congress, are governed by the common law.
5. Where a party indicted was neither in custody nor under bond when the grand jury which indicted him was impaneled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement.
6. A plea in abatement alleging such disqualification will not be favored, but should contain all essential averments pleaded with exactness.
7. A plea in abatement which alleged as a disqualification of a grand juror that he "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort," but without any specific averment of time or place, is uncertain and bad.
8. The proper conclusion of a plea in abatement is a prayer that the indictment be quashed.
9. When a plea in abatement prays for a judgment which the court can not give upon a plea in abatement the plea is defective and bad.
10. A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified.

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This was an indictment for conspiracy to defraud the United States based on sec. 5440, Rev. Stats.

The defendants pleaded specially to the indictment returned against them, that two of the grand jurors (naming them) by whom the indictment was found were disqualified to act as such, because without duress or coercion they had taken up arms and joined the insurrection and rebellion against the United States, and adhered to the said insurrection and rebellion, giving it aid and comfort prior to the present term of this court.

To this plea the United States Attorney demurred, and insisted that the plea was bad in substance and form.

Messrs. J. R. Beckwith, United States Attorney, and *J. H. New*, Associate United States Attorney, for the United States.

Messrs. Thomas J. Semmes and *J. D. Rouse*, for the defendants.

Woods, Circuit Judge. The plea is based on sec. 820 of the Revised Statutes. This declares: "The following shall be cause of disqualification and challenge of grand and petit jurors in the courts of the United States, in addition to the causes existing by virtue of section 812, namely: without duress and coercion to have taken up arms, or to have joined any insurrection against the United States; to have adhered to any insurrection, giving it aid and comfort," etc.

This is an absolute disqualification imposed by statute. That such a disqualification of a single grand juror vitiates the indictment was the doctrine of the common law.

"If any one of the grand jury who find an indictment be within any one of the exceptions of the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it." Hawk. Pl. of the Crown, b. 2, ch. 25, secs. 16, 26 and 28; Whart. Crim. Law, 170, sec. 468 (6th ed.); 1 Chit. Crim. Law, 309; *United States v. Blodgett*, 35 Ga., 336 (per Erskine, U. S. Judge); *United States v. Wilson*, 6 McL., 604; *United States v. Williams*, 1 Dill., 485; *United States v. Collins*, 1 Woods, 521.

Such has also been the doctrine of most of the state courts of America. See *Doyle v. State*, 17 Ohio, 222; *State v. Mid-*

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Idleton, 5 Port., 484; *Commonwealth v. Parker*, 2 Pick., 559; *Barney v. State*, 12 Smedes & M., 68; *Van Hook v. State*, 12 Tex., 252; *Commonwealth v. St. Clair*, 1 Grat., 556; *Hardin v. State*, 22 Ind., 347; *State v. Duncan*, 7 Yerg. (Tenn.), 271; *State v. Rockafellow*, 1 Halst., 405; *State v. Ligon*, 7 Port., 167; *Wilburn v. State*, 21 Ark., 198; *State v. Cole*, 17 Wis., 695; *Kitrol v. State*, 9 Fla., 9; *Vattier v. State*, 4 Blackf., 73; *State v. Symonds*, 36 Me., 128; *State v. Martin*, 2 Ired., 101.

As the federal courts, in questions of criminal jurisprudence, not regulated by statute, must be governed by the common law, and as the rule of common law, as stated by Hawkins, *supra*, seems to be well settled, I must hold that the plea of the defendants under consideration is good in substance.

It is next objected to this plea that it comes too late; that the grand jurors subject to the disqualification should have been challenged at the time the grand jury was impaneled. This objection is clearly untenable. It does not appear that the accused ever had an opportunity to present a challenge. On the contrary, the court knows, from its own records, that the accused were not under arrest or recognizance when the grand jury was impaneled. The first charge of offense against the criminal laws of the United States committed by them was made in the indictment to which they have pleaded. They were not supposed to have knowledge of what was going on in the grand jury room. On the contrary, the grand jury was sworn to secrecy, in order that they might not be advised. Their first chance to object to the qualifications of any members of the grand jury was when they were called upon to plead to the indictment. If they have the right to object at all, it seems clear they have not lost it by failure to exercise it at an earlier time, for they have objected at the very first opportunity. That a disqualification enacted by statute may be pleaded in abatement, if done reasonably, has been held in the following cases: *United States v. Blodgett*, 35 Ga., 336; *Doyle v. State*, 17 Ohio, 222; *United States v. Wilson*, 6 McL., 604; *Commonwealth v. Parker*, 2 Pick., 559; *Barney v. State*, 12 Sm. & M., 68; *Hardin v. State*, 22 Ind., 347; *Wilburn v. State*, 21 Ark., 198; *State v. Cole*, 17 Wis., 674; *Kitrol v. State*, 9 Fla., 9; *Stanley v. State*, 16 Tex., 557; *State v. Ostrander*, 18

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Iowa, 435; *State v. Rickey*, 5 Halst., 83; *People v. Jewett*, 3 Wend., 314. And it was the same at common law. Hawk. Pl. of the Crown, b. 2, ch. 25, secs. 16 and 28; 1 Chit. Crim. Law, 309.

When the courts have held that the objection to a grand juror must be taken before indictment, the ground of exception has usually been to the juror, and has not been a statutory disqualification. *United States v. White*, 5 Cranch. C. C., 457; *The People v. Jewett*, 3 Wend., 314.

It is next objected that the disqualification mentioned in sec. 820, Rev. Stat., is one which it rests within the discretion of the court and of the prosecuting officer of the government to insist on, and that the accused have no right to challenge for such cause.

The theory on which this objection is founded is based on sec. 821, Rev. Stat., which declares that at every term of any court of the United States, the district attorney, or other person acting in behalf of the United States in said court, may move, and the court in its discretion may require the clerk to tender to every person summoned to serve as a grand or petit juror, venireman or talesman in said court, the following oath or affirmation, namely; then follows the form of an oath to the effect that the affiant has not, without duress and constraint, taken up arms or joined any insurrection or rebellion against the United States, etc., and the section concludes as follows: "And every person declining to take said oath shall be discharged by the court from serving on the grand or petit jury, or venire to which he may have been summoned."

This section does not affect the positive enactment of the preceding section, which declares that engaging voluntarily in insurrection or rebellion against the United States shall be a cause of disqualification and challenge.

Without the oath prescribed by sec. 821, a juror might be sworn on his *voir dire*, and if found subject to the disqualification prescribed by sec. 820, he could be challenged.

Section 821 seems designed to provide a method by which, in advance, the court in its discretion could purge the venire of both grand and petit jurors of any persons who could not take the oath therein prescribed. To hold, however, that the right of any

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person interested to challenge a grand or petit juror disqualified under sec. 820 is left discretionary with the United States attorney and the court, is to blot out that section altogether. There stands its positive enactment that engaging in any insurrection or rebellion against the United States shall be cause of disqualification and challenge of grand and petit jurors. This provision enures to the benefit of all parties in all cases, whether civil or criminal, and is entirely unaffected by the following section which provides additional means of enforcing, but surely does not restrict the provisions of sec. 820.

I am of opinion, therefore, that the plea is not only good in substance, but that it has been seasonably pleaded.

It is further objected to the plea that it is insufficient in matter of form.

The defects alleged are:

1. That the plea does not tender a clear and distinct issue of fact, but is vague, uncertain and insufficient.
2. That it does not conclude as required by the rules of pleading, and
3. That it is not verified.

1. Pleas like the present are not favored, and the law requires that they shall contain all essential averments pleaded with strict exactness. *United States v. Williams*, 1 Dill., 485; *O'Connell v. Regina*, 11 Clark, & Finn., 155; *Commonwealth v. Thompson*, 4 Leigh, 667; *Hardin v. State*, 22 Ind., 347; *Lewis v. State*, 1 Head (Tenn.), 329. This plea alleges, as cause of disqualification, that one of the grand jurors (naming him) "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort prior to the present term of this honorable court, having been captain of company O, in the Crescent regiment from New Orleans, in the service of the so-called Confederate States of America during the late civil war between the United States and the said Confederate States."

The averment as to the other grand jurors is in similar terms.

These averments tender the only issues of fact to be found in the plea. It is obvious that the plea fails of the required certainty. There is no averment of time or place. The "insurrec-

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tion or rebellion against the United States" extended over a period of five years and over a vast territory. The prosecution is entitled to be informed by the plea when and where the juror took up arms and joined the rebellion and insurrection against the United States. The plea gives no information upon these points. It lacks the precision and certainty required in all criminal pleading, and is in this respect fatally defective.

2. The plea concludes as follows: "and this they are ready to verify; wherefore they pray judgment, and that by the court they may be dismissed and discharged from the said premises in the said indictment above specified."

The prosecution claims that this is not the proper conclusion.

There seems to be some confusion in the adjudicated cases upon the conclusion proper to a plea in abatement. See *The King v. Shakespeare*, 10 East, 83, where Lord Ellinborough held that a plea of misnomer, by which the defendant prayed judgment of the said indictment, and that he might not be compelled to answer, the same was well pleaded, "although," he said, "if it had not been for the precedent cited of *The King v. Westby*, I should have been much inclined to think this plea bad in respect to its conclusion."

The conclusion adopted by the pleader in this case is the one appropriate for and used in pleas in bar, as the plea of *autre fois acquit* or *autre fois convict*. See form 1154, 2 Wharton's Precedents. By the same authority the proper conclusion for a plea in abatement, or plea that the defendant has no addition, or plea of misnomer, or plea of wrong addition, is a prayer that the indictment may be quashed. See 2 Whart. Precedents, forms 1141, 1142 and 1144; Stark. C. P., 473; Whart. Crim. Law, sec. 536; *State v. Middleton*, 5 Port., 484.

The judgment prayed for by this plea is one only proper to be pronounced upon a plea in bar. "In a plea in abatement the court will give no other than the proper judgment prayed for by the party." *The King v. Shakespeare*, 10 East, *supra*. As the judgment prayed for in this plea is one the court can not give upon a plea in abatement, the plea is defective and bad.

3. As to the objection that the plea is not verified, I simply remark that so far as I have been able to look into the author-

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ities, only pleas of misnomer or wrong addition are required to be verified, and the plea should expose the defendant's proper name and addition. Whart. Am. Crim. Law, sec. 537. The reason of the rule as applied to such pleas is obvious, and the reason does not apply to the plea under consideration.

The result of my investigation is that the plea is uncertain and insufficient and does not pray the proper judgment of the court, but that the facts referred to, if properly pleaded, would have justified a judgment that the indictment be quashed.

The demurrer to the plea is sustained.

Since the argument of the demurrer it has been suggested that section 820 of the revised statutes was improperly included by the compilers in their revision of the statutes, that section not having been in force on the first day of December, 1873. This appears to be true. The section referred to was section 1 of the act approved June 17, 1862, entitled "an act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts" (12 Stat., 430). This section was repealed by the fifth section of the act approved April 20, 1871, "to enforce the provisions of the fourteenth amendment to the constitution of the United States, and for other purposes" (17 Stat., 15).

But the conclusion which the prosecutor seeks to draw from these facts, namely, that section 820 of the revised statutes is not now a part of the statute law, does not, in my opinion, follow. The work of the compilers, including section 820, was submitted to congress, and the whole reenacted by the adoption of the revised statutes. The compilers may have exceeded their authority, congress may not have designed to reenact section 820, but it has done so, and we cannot go behind the law and cure the mistakes and inaccuracies of congress. "We are bound," says Mr. Justice Buller in *Jones v. Smart*, 1 Term, 44, "to take the act of parliament as they have made it;" and Mr. Justice Story in *Jones v. Rues*, 2 Sumn., 354, observes: "It is not for courts of justice *proprio Marte* to provide for all the defects or mischiefs of imperfect legislation."

That must be done by congress itself, and until it is so done we must take the law as we find it.

Chuck & Brother vs. Mesritz.

APRIL TERM, 1876.

CHUCK & BROTHER vs. B. O. MESRITZ.

If a debtor in embarrassed circumstances enters into an arrangement with all his creditors to pay them a certain proportion of their claims, in consideration of a discharge of their demands, and he privately agrees to give a better or further security to one than to the others, the contract with the other creditors is void.

This case was submitted to the court upon the law and facts, the parties having waived the intervention of a jury.

Mr. George W. Race, for plaintiffs.

Messrs. Thomas J. Cooley and Edward Phillips, for defendants.

Woods, Circuit Judge. The suit is brought on two promissory notes made by defendant at New Orleans, and payable to his own order, both dated August 26, 1867; one for \$652, due November 26, 1867, and the other, \$656, due December 26, 1867, with current rate of exchange on New York, and by him indorsed to J. B. Jaroslowskie Brothers & Co., and by them to the plaintiffs.

The execution, as well as the indorsement and transfer of the notes is admitted by the answer. The defense set up is as follows: That in February, 1869, an agreement was signed by all the creditors of defendant, including Jaroslowskie Brothers & Co., who then owned the notes sued on to accept twenty-five per cent. of the amount due on their respective claims, in full satisfaction thereof. Of course it is incumbent on the defendants to establish their defense by the preponderance of evidence.

There is some conflict of testimony as to the terms of this agreement, but I think the decided weight of evidence is in favor of the version of plaintiffs, that the defendant agreed with Amberg, a member of the firm of Jaroslowskie Brothers & Co., that if he would procure the written assent of all the other creditors of defendant to accept twenty-five cents on the dollar of their

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claims, he, the defendant, would pay Jaroslowskie Brothers & Co. their claim in full.

A most persuasive piece of evidence on this point is found in the fact that Berwin, of New Orleans, who acted in the matter of the adjustment as an agent of the defendant, and who furnished the money to the defendant wherewith to pay the twenty-five cents on the dollar, was informed by a letter from Jaroslowskie Brothers & Co., written by Amberg, that he, Amberg, had succeeded in getting the signatures of all the creditors to the contract of compromise, "ours, of course, excepted," stating that some of the creditors had imposed the condition that the money should be paid during the then current month of February, and urging him to instruct Converse & Co. of New York, by telegraph, to pay the amount of the compromise agreed on to the creditors.

Berwin, in a letter dated February 22, 1869, acknowledged the receipt of this letter, and adds: "Everything is O.K. I will advise to-morrow Mr. Converse to pay all creditors according to settlement. You can rely upon it that everything is settled in regard to the balance between you and Mr. Mesritz. I had a conversation with him, and he told me he would inform you himself, and will settle everything satisfactory with you."

But the defendant says that if the contract between him and Jaroslowskie Brothers & Co. was as claimed by the plaintiff, it was a fraud on the other creditors and void.

The authorities sustain this position.

Where a debtor, in embarrassed circumstances, enters into an arrangement with all his creditors to pay them a certain proportion of their claims in consideration of a discharge of their demands, if he privately agree to give a better or further security to one than to the others, the contract with the other creditors is void, because the very basis is that each creditor shall receive an equal benefit and take a proportionate share. Story's Eq. Jur., secs. 378 and 379 and notes.

A neglect by Jaroslowskie Brothers & Co. to make known to the other creditors the fact that they were to be paid in full, while the other creditors were to receive only twenty-five cents on the dollar, was a fraud on the other creditors, and if it was the

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understanding between Mesritz and Jaroslowskie Brothers & Co. that the arrangement should be kept secret from the other creditors, the contract is void.

But if the contract is void, it is void on account of the fraud of both parties. It is void totally. This would leave the parties just where they would have been had no such contract been made.

The case is then in this position: The plaintiffs are the transferees of notes made by the defendant, the execution and transfer of which is admitted.

The defendant having failed to prove that Jaroslowskie Brothers & Co. agreed, in common with the other creditors, to accept twenty-five cents on the dollar of their debt, now insists that if the contract was as claimed by Jaroslowskie Brothers & Co., it was fraudulent and void. If this be conceded, the defendant is in the position of striving to protect himself against a recovery on his own promissory notes, by alleging that the contract by which he agreed to pay them in full was fraudulent, and, therefore, void.

The only successful defense that defendant could make was, by establishing the compromise at twenty-five cents on the dollar by a valid contract. In this he has failed. If the contract of compromise was as claimed by Jaroslowskie Brothers & Co., then whether it was valid or void, there must be a recovery against defendant for the full amount of his notes. If valid, the contract bound him to pay the full notes with interest. If the contract was void, the notes bound him to do the same thing.

There must be judgment for plaintiff for the amount claimed.

FRANK AMES, Trustee, vs. THE NEW ORLEANS, MOBILE & TEXAS
RAILROAD COMPANY et al.

1. The modification of a mortgage does not extinguish it, nor is its lien affected by the substitution of a new note or bond for the original note or bond secured by it.
2. A railroad company having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage on the same property to

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secure a larger number of bonds, which recited that the holders of the bonds secured by the original mortgage had agreed to surrender the same, and receive in substitution therefor new bonds, to be secured by the original mortgage as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second. *Held*,

(a) That the holders of said twenty bonds were not entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the substituted bonds; but

(b) That they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, but were entitled to the same proportion of the proceeds of the mortgaged property as if the second mortgage had not been executed.

3. There is nothing in the jurisprudence of Louisiana contrary to the doctrine of this case.

Heard on petition of Arphaxad Loomis and others.

Mr. W. W. Howe, for petitioners.

Mr. John A. Campbell, contra.

Woods, Circuit Judge. The bill in this case was filed for the foreclosure of a mortgage executed by the principal defendant on its property and road west of the Mississippi river, in the state of Louisiana.

It appears from an agreed statement of facts that on the 15th of March, 1870, the railroad corporation, then known as the New Orleans, Mobile & Chattanooga Railroad Company, conveyed by a deed of that date all its estate and property in Louisiana and Texas west of the Mississippi river, to secure bonds, to be issued at the rate of \$12,500 per mile of the main line of road from New Orleans to the Sabine river, and \$25,000 per mile from the Sabine to Houston, in Texas, making the entire amount that might be issued under this deed of trust to be \$5,562,000, and no more. There were issued, in fact, under the deed of trust, \$2,825,000 only. This deed of trust provided that no bonds whatever should be issued on branch roads till they were constructed and their tracks laid.

On the first of January, 1872, the railroad company, its name in the meantime having been changed by act of the legislature to the New Orleans, Mobile & Texas Railroad Company, executed a new deed of trust of that date on the same property as

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that conveyed by the deed of March 15, 1870. The purpose of this deed was to change the limit of the amount of the bonds of the company to be issued under said deed of trust of March 15, 1870, so as to allow besides the bonds already issued an additional issue of \$25,000 per mile of bonds for each mile of a branch road to be constructed from Brashear City to Vermillionville, but not to exceed the sum of \$1,625,000. This deed of trust recited that it had been arranged and agreed that the holders of the outstanding bonds under the original mortgage and deed of trust should surrender the same for cancellation and receive in substitution therefor bonds to the like amount executed in the name of the New Orleans, Mobile & Texas Railroad Company.

This project was so far carried out that all the holders of bonds, secured by the original mortgage and deed of trust of March 15, 1870, except Arphaxad Loomis, and the other petitioners, surrendered their bonds, and received in their stead new bonds issued under and secured by the original mortgage and deed of trust as modified and limited by the deed of January 1, 1872.

Loomis and the other petitioners are the holders of twenty of the original bonds. They claim to have a priority over all the new bonds issued to take up the original bonds, and pray for a decree which shall recognize this priority, and declare their bonds to be a first lien on the property conveyed by the trust deed of March 15, 1870, and that their bonds be paid by preference out of the proceeds of the sale of the railroad property when a sale is made.

The theory upon which the prayer of this petition is based is, that those bonds dated January 1, 1872, issued in lieu of the original bonds dated March 15, 1870, are in no way secured by the original trust deed, but have a lien on the railroad property by virtue only of the deed of January 1, 1872.

An inspection of this latter trust deed will show that this theory is not founded on fact.

The trust deed of 1872 states the fact of the execution of the deed of March 15, 1870, and the inscription thereof, etc., and the purpose of the railroad company to change the limit of the amount of bonds to be issued and secured under the original trust deed;

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recites that the holders of the outstanding bonds issued under the original trust deed have agreed to surrender the same, "and receive in substitution therefor new bonds for a like amount executed by The New Orleans, Mobile & Texas Railroad Company, to be issued under and secured by said mortgage or deed of trust (the deed of March 15, 1870) as the same is modified and limited by this instrument."

The deed of January 1, 1872, further declares, that "the parties hereto, in consideration of the premises, etc., have covenanted, granted and agreed and do hereby covenant, grant and agree to and with each other, that the stipulations and provisions of the above mentioned mortgage or deed of trust of March 15, 1870, shall be and are hereby modified and limited in the manner and to the effect following, with like effect as if such mortgage or deed of trust had originally contained such modifying and limiting provisions which are herein contained," etc.

The deed of January 1, 1872, further declares that "the said party of the first part (The Railroad Company) in consideration of the premises and of one dollar, etc., in order to secure the payment of the principal and interest of its said first mortgage bonds to be issued in the form and of the tenor and to the effect herein above described in that behalf; according to the tenor and effect of said bonds and the accompanying coupons, and for further assurance and confirmation of the estates and interest conveyed in mortgage by the said original mortgage or trust deed of March 15, 1870, as hereby modified, hath granted, bargained and sold," etc.

These provisions of the deed of January 1, 1872, clearly reveal the purpose of the parties thereto, that the bondholders, surrendering their original bonds for the new ones should not lose any right or estate granted by the first deed of trust, save as the same were modified by the second.

It was upon this express condition, thrice repeated in the trust deed of January 1, 1872, that the bondholders consented to give up their old bonds and take the new ones.

It clearly appears that there was to be no cancellation of the mortgage of 1870; all the bonds were designed to be secured by it. The new bonds correspond with the old in amount, interest,

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time of payment, and only differ in date, and the name of the company, which had been changed since the old bonds were issued.

The modification of the mortgage does not extinguish it, nor is its lien affected by the substitution of a new note for the old one. *Watkins v. Hill*, 8 Pick., 522; *Pomroy v. Rice*, 16 id., 22; *Brinkerhoff v. Lansing*, 4 Johns. Ch., 65; *Dana & Hayden v. Binney*, 7 Vt., 501; *Chase v. Abbott*, 20 Iowa, 154; *Connor v. Banks*, 18 Ala., 42; *Cullum v. Branch Bank at Mobile*, 23 Ala., 798.

The petitioners claim, however, that the question must be governed by the law of Louisiana, and cite the case of *Bell v. Murphy*, 2 La. An., 765, as authority to show what the jurisprudence of this state is upon the question in hand. In that case a mortgage was given to secure the mortgagee for a particular indorsement made by him for the accommodation of the mortgagor. The note thus indorsed was partly paid by the mortgagor, and a new note given for the remainder due, which the mortgagee indorsed. The court held that the mortgage did not indemnify the mortgagee for this latter indorsement. The reason given was that the mortgage was not a general one to secure the plaintiff for indorsements. It was given as security against the indorsement of a specific note, which the evidence showed had been subsequently novated and extinguished.

That case differs from this in this most material particular, that in this case there was an express understanding that the original mortgage should stand for the benefit of the new bonds, and it was upon that condition that the substitution was made. The court is asked to step in between the parties and annul this contract. The law does not annul contracts made by the parties unless they are fraudulent or against public policy. No reason can be given why the contract made between the railroad company and its bondholders should not be enforced.

A very instructive case upon the question presented by this petition, is *Stevens v. Mid-Hants Railway Company*, 7 Eng. Rep., 555, reported also in 8 Law Rep. Ch. Appeal Cases, 1064.

In my judgment, the petitioners are not entitled to be paid the full amount of their bonds in preference to the holders of the

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substituted and other bonds issued under the deed of trust of January 1, 1872.

The most that petitioners can claim is that they shall not be prejudiced by any change made in the terms of the deed of March 15, 1870, by the deed of January 1, 1872. They are entitled to have their rights preserved under the original trust deed. This may be done by giving them such part of the proceeds of the sale as they would have been entitled to if the new bonds and new trust deed had never been executed. In other words, as only 2,825 bonds, of one thousand dollars each, were issued under the original trust deed, of which the petitioners hold twenty, they are entitled to twenty 2,825ths of the proceeds of the sale, and no more.

EDGAR NOTT VS. THE STEAMBOAT SABINE AND CARGO et al.

The 19th admiralty rule was intended to prohibit a joinder of proceedings *in rem* and *in personam* in the same libel for the salvage of the same goods.

Libel for salvage on appeal from a decree of the district court.

Messrs. C. B. Singleton and R. H. Browne, for libellants.

Messrs. John A. Campbell and M. M. Cohen, for claimants.

BRADLEY, Circuit Justice. This case is not entirely like the cases which have been referred to on the argument. Those were cases in which property and its owners were proceeded against in the same libel, the former *in rem*, the latter *in personam*. And the weight of authority, as fairly reviewed by Judge CONKLING, in his Treatise on Admiralty, pp. 25 to 42, 2d edition, is, that such a libel cannot be sustained. The 19th admiralty rule, which provides, that "in all suits for salvage the suit may be *in rem* against the property saved or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed," evidently recognizes this principle. In view of the remarks and discussions which had taken place on the subject in admiralty courts,

before the rule was adopted, it seems almost certain that it was intended to prohibit a joinder of proceedings *in rem* and *in personam* in the same libel for the salvage of the same goods. This was more than hinted at in the case of *Bondies v. Sherwood et al.*, 22 How., 216. The case of *Newell v. Norton and Ship*, 3 Wall., 266, has been referred to as adverse to this view. But I do not so consider it. That was a case of collision, in which the rule is, that the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*. The libel had been originally against the ship and master, and pilot and owners. The court below had stricken out the pilot and owners, and had sustained the libel as against the ship and master, although the latter was a part owner. This was sustained by the supreme court as correct. The court say: "The objection, that the libel *in rem* against a vessel; and *in personam* against the owner (the word 'owner' being an evident misprint for 'master') cannot be joined, was properly overruled, as it was in conformity with the 15th rule in admiralty, as established in this court."

But the case before this court is different from the ordinary case referred to in the cases and in the rule. This is not a libel *in rem* against property, and *in personam* against the owner of the same property. It is *in rem* against the vessel and *in personam* against the consignees of the cargo. The joinder of actions against both vessel and cargo *in rem*, or against the owners of the vessel and the owners of the cargo *in personam*, in a suit for the same salvage service, is not contended to be irregular; but it is claimed, that if the actions be joined, they must be pursued in the same manner; either both *in rem* or both *in personam*. I am inclined to think that this is the correct view. Where a vessel and cargo have been saved, the latter belonging, perhaps, to a multitude of owners, the more convenient way would be, to libel the ship and cargo for the salvage, and let the parties interested intervene for their respective interests. No doubt the owners of the ship, by virtue of their special property in the cargo, could claim the whole; and, then, they could deliver out the cargo to its owners upon the ordinary general average bond. But to sue the ship *in rem*, and the

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owners of the cargo *in personam*, or *vice versa*, would be productive of confusion, and would involve all the inconveniences and embarrassments which were sought to be obviated in the ordinary case, by the adoption of the 19th admiralty rule.

The decree of the district court is affirmed with costs, and the cause will be heard upon the libel as against the vessel alone.

GASTREL & RAYMOND vs. A CYPRESS RAFT.

A court of admiralty has not jurisdiction to try the question of title to certain logs which have been incorporated into a raft and floated down a public navigable river.

ADMIRALTY APPEAL.

Mr. Wm. Grant, for libellants.

Mr. W. W. Howe, for claimants.

WOODS, Circuit Judge. Libellants allege that they are the owners of a certain tract of land in Mississippi; that the claimants wrongfully entered thereon, and without consent of libellants, cut one hundred and forty cypress logs, and caused them to be incorporated into a raft and floated down the Mississippi river and navigated to the city of New Orleans, where they now lie in said raft, and pray that a warrant of arrest may issue against the raft and the one hundred and forty trees or logs of cypress timber incorporated therein, and that the possession and ownership of said logs may be adjudged to libellants according to the course of admiralty.

Objection is raised to the jurisdiction of the court of admiralty over this cause.

The suit is not brought upon a maritime contract, or to enforce a maritime lien, or to secure possession of or establish title to the raft. But it is to obtain possession of one hundred and forty logs which libellants aver are their property, having been cut from their land, and incorporated with other logs in the raft and floated down the Mississippi river to New Orleans.

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Has this court jurisdiction to try the title to the logs claimed by libellants, and incidentally the title to the land from which they were cut, because they have with other logs been formed into a raft and floated down a public navigable river?

The case of *Jones v. The Coal Barges*, 3 Wall. Jr., 53, was a libel against a barge loaded with coal, to recover damages for a collision. GRIER, justice, said: "The subject of dispute proposed by the libel is a collision between two coal barges loaded with coal. They are not ships or vessels in the maritime sense of the terms. They do not take out a coasting license. They are generally mere open chests or boxes of small comparative value, which are floated by the stream, and sold for lumber at the end of their voyage. A remedy *in rem* against such a vessel, either for its contracts or its torts, would not only be worthless, but ridiculous, and the application of the maritime law to the cargo and the hands employed to navigate her would be equally so. * * Every mode of remedy and doctrine of the maritime law, affecting ships and mariners, may be justly applied to ships and steamboats, but could have no application to rafts and flat-boats. A court of admiralty is not needed to try common law actions of trespass, nor to administer common law remedies in any form."

In the case of *Tome v. Four Cribs of Timber*, Taney's Decisions, 533, it was held by Chief Justice TANEY, that "rafts anchored in a stream, although it be a public navigable river, are not the subject matter of admiralty jurisdiction where the right of property or possession is alone concerned. Any assistance rendered to these rafts, even when in danger of being broken up or swept down the river, is not a salvage service in the sense in which that word is used in the courts of admiralty. The district court therefore had not jurisdiction to issue the process by which the marshal was directed to take the property from the possession of the respondent; the controversy was proper for the decision of a court of common law, and the remedy of the owners to regain possession was an action of replevin, and not a libel in the district court; consequently its decree must be reversed and the libel also dismissed."

If these two decisions are law, and barges and rafts cannot be

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libeled in admiralty for either a collision or salvage, it would seem to follow conclusively that a libel will not lie to try the title to a part of the materials of which a raft is constructed, even though the raft may be found upon a public navigable river.

The propriety of this ruling is made evident by the record in this case, for the main question to which nearly all the evidence is directed is the question of title to a tract of land on the Homochitto river, in Mississippi, from which it is alleged the cypress logs were cut; both libellants and claimants asserting title to the land, and essaying to establish title by the production of deeds and the evidence of witnesses as to the boundaries. Is this question proper for trial by a court of admiralty sitting in Louisiana?

In my judgment, the libellants have mistaken their remedy, which should have been a common law action of trespass, *quare clausum fregit*, or replevin, to recover possession of the logs.

The opinion of this court is, therefore, that it is without jurisdiction in this case, and its judgment is that the libel be dismissed.

 THOMAS J. STEWART vs. WM. FAGAN et al.

1. It is an indispensable prerequisite to a creditor's bill which seeks to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, that the claim should first have been reduced to judgment.
2. A sale made in pursuance of a decree of a court of admiralty, obtained without fraud, cuts off all claims of the original builders of the boat or other creditors, and of her owners.

IN EQUITY.

The bill alleged that the complainant was the indorser and holder of a large number of drafts, drawn by "Miles Owen for steamer Katie" on one J. Pinckney Smith, and accepted by him; all dated April 6, 1872, except three, dated November 1, 1872, and transferred by the payees to complainant; all of which were due and unpaid.

It was further alleged that one J. M. White caused the steamer

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Katie to be built at Louisville, Kentucky, and gave the several drafts now held by complainant for liabilities incurred in building and fitting out said steamer. On the 29th of February, 1872, White being insolvent, and having no property but the Katie, mortgaged her to certain of his creditors, as follows: to Wm. Fagan & Co. for \$8,000, to Lagan & Macinson for \$4,000, to Richard England for \$4,000, to McCloskey, Bigley & Co. for \$9,000, and to Edward Conniery & Son for \$20,000. It was charged that these creditors took their mortgages for these round sums, which were more than were due them, knowing that White was insolvent, and for the purpose of obtaining an unjust and fraudulent preference over other creditors.

The bill further stated that said J. Pinckney Smith was originally bound with White for the debts contracted in building and fitting out said steamer, and conspired with said mortgage creditors to prevent the Katie from being subjected to the claims of her builders and White's general creditors, and induced said Miles Owen to become the purchaser of said steamer, which he did on the 7th day of March, 1872, a few days before the 13th of March, 1872, when an involuntary petition in bankruptcy was filed against White by Philip McCullough & Co., his creditors; that Miles Owen was at the time of the purchase without any knowledge of the steamboat business, and took the title of said boat at the instance of Smith, and to serve his own and the purposes of the mortgage creditors, and gave the management of the boat to a committee composed of Wm. Fagan, D. C. McCan and J. Pinckney Smith.

It was further alleged, that on the 29th of August, 1872, Owen mortgaged said boat to Wm. Fagan & Co. for \$7,259, to E. Conniery, Son & Co. for \$10,601, and to fifteen other firms and individuals for specific amounts, all of which are set out in the bill; and that Miles Owen was a mere man of straw, interposed to take the title of the boat for the benefit of said mortgage creditors and said Smith, and that he did not pay for her; that in pursuance of the plan to place said boat beyond the reach of the claims held by complainant, the committee, which had her in charge, permitted her to be libeled in admiralty in the U. S. distirct court for Louisiana by the Underwriters

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Wrecking Company in November, 1872; that an order of sale was obtained, and the boat sold after five days notice; that after the order of sale was obtained, the libel was dismissed; but nevertheless the boat was afterwards, on the 11th of January, 1873, sold to Wm. Fagan, one of the committee, for \$23,000. The sale was advertised for cash, but on the day preceding the sale, the court allowed the marshal to receive and take a bond for the entire price, except a sufficient sum to pay costs and the expenses of sale; but this privilege was extended only to the mortgage creditors of the boat.

After this, the bill alleged, Fagan made a pretended sale of the boat to John W. Cannon, who acknowledged that he held the boat for the benefit of the mortgage creditors; that Cannon paid nothing on the boat, but assumed to pay within one and two years the debts which had been recognized by Miles Owen, by the mortgage of August, 1872; he agreed to render statements of the expenses and earnings of the boat to the mortgage creditors, for whom he in fact held the boat; that he run said boat for two years, and her net earnings during that time amounted to \$62,000; a sum more than sufficient to pay all the debts due to said mortgagees; that Cannon, after the transfer of said boat to him, gave possession of her to Wm. Fagan and others, a committee representing the mortgage creditors, who were authorized to employ the master and clerk.

The bill further alleged, that on the 23d of January, 1875, Cannon transferred said boat by bill of sale to said committee, for the nominal consideration of \$68,377, but the committee paid nothing for her, and merely took the title to enable them to sell said boat and appropriate the proceeds; that the admiralty sale was null and void, and that before and since the sale, the said boat had been held by the said several parties for account of said mortgage creditors, and that said committee received the title to said boat and held the same in payment of their pretended mortgage.

The bill further alleged that Wm. Fagan, Edward Connery, D. C. McCan and P. G. Bigley, members of said committee, had undertaken to sell said boat to Mrs. Mary Tobin, but that the consideration money paid by Mrs. Tobin was still in the hands of

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Fagan, Connery and McCan, three of the committee who had not yet paid it over to the mortgage creditors.

The prayer of the bill was, that the mortgages made by White and Miles Owen might be declared fraudulent and annulled; that the sale of the boat made January 11, 1873, by the admiralty court, and the subsequent sales might be annulled, and Miles Owen adjudged to be the owner thereof; and that complainant might have a decree for the amounts claimed in his bill against Miles Owens and J. Pinckney Smith, and that the Katie might be subjected to said claims and sold to satisfy the same, or in the event that the sale to Mrs. Tobin had been consummated, that a decree in favor of complainant for the proceeds of said sale might be rendered against Fagan, Connery and McCan, and that the claims of said mortgage creditors on said steamer might be rejected; and for an injunction against Fagan, Connery and McCan, to restrain them from paying over the proceeds of the sale to the mortgage creditors, or if the sale to Mrs. Tobin had not been perfected that they might be restrained from making the same, or any other sale or disposition of said steamer.

The cause was heard upon a motion for the preliminary injunction, according to the prayer of the bill.

Mr. Thomas Hunton, for complainant.

Messrs. Wm. M. Randolph and B. Egan, for defendants.

Woods, Circuit Judge. The obvious objection to the prayer for injunction is that there is no equity in the bill and on demurrer it would be dismissed.

It is a creditor's bill seeking to subject property of the debtor fraudulently conveyed and covered up to the payment of the complainant's claims. An indispensable requisite to such a bill is that the claims upon which it is based should have been first put in judgment. There is no averment in the bill that this has been done. The bill is predicated on certain drafts alleged to have been drawn by one Miles Owens, and accepted by J. Pinckney Smith and transferred to complainant, but which have never, so far as appears, been reduced to judgment. This is a fatal defect in the bill.

The complainant does not set up or claim any lien upon the

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property which he seeks to subject to the payment of his debt. He has simply a debt which he can sue on at law. Until he has exhausted his remedy at law by the recovery of a judgment, equity has no jurisdiction. *Non constat* but that on an execution he might make his money. *Jones v. Green*, 1 Wall., 330; *Beck v. Burdett*, 1 Paige, 305; *McElvain v. Willis*, 9 Wend., 548; *Crippen v. Hudson*, 3 Kern., 161.

But even if this defect in the bill did not exist, I should be constrained to overrule the motion. The answer of Fagan, Conery and McCan traverses every allegation of fraud made in the bill, and with the affidavits filed, shows that the claim of the mortgage creditors upon the boat was honest and fair, and the amounts claimed by them justly due.

The averment of the bill that the admiralty sale of the *Katie* was void is entirely without proof to support it. It appears that before the libel of the Underwriters Wrecking Company was dismissed, other creditors of the *Katie* intervened and it was upon their claims she was sold. The sale was made in pursuance of a decree of the court of admiralty. There is no proof and in fact no averment that it was unfairly obtained. This sale cuts off all claims of creditors and of the original builders or proprietors of the boat. The purchasers at that sale had the right to place the title where they pleased and to do with the boat as they pleased. There seems to be not the slightest proof of any fraudulent practices on the part of the mortgage creditors of the *Katie*. They were vigilant and looked after their own interests. The creditors, whose evidences of debt complainant holds, slept on their claims, and two years after a sale of the *Katie* under an admiralty decree, this bill is filed.

The case has no basis to stand on, either upon the law or the facts.

Motion for injunction overruled.

In re Commercial Bulletin Company.

IN re COMMERCIAL BULLETIN COMPANY. JAMES BUOKNER vs. W. L. JEWELL and E. E. NORTON, Assignees.

1. A landlord cannot prove, as a claim against a bankrupt's estate, a demand for rent which accrued after the bankruptcy.
2. But neither the bankrupt nor the assignee can claim to occupy leased premises after the bankruptcy without paying the rent in full.
3. If either the bankrupt or the assignee continues to occupy the leased premises after the bankruptcy, he is liable for the rent, and the landlord has the same lien upon the goods on the premises as he has upon the goods of other tenants.
4. Where a bankrupt's assignee occupied, after the bankruptcy, for storing the goods of the bankrupt's estate, premises which had been leased to the bankrupt, it was no answer to a demand for rent by the landlord, for the assignee to say that all the assets of the estate had been consumed by the general expenses of the bankruptcy.

The petitioner leased a store, 133 Gravier street, New Orleans, to the bankrupt, for five years, commencing October 1, 1871, at an annual rent of \$3,200, payable in monthly installments of \$266.66. The lessee became bankrupt January 9, 1872, having paid all arrears of rent up to that time.

The assignees were appointed in April, and took possession of the premises, and refused to give up possession to the landlord. They paid him rent, however, from time to time, to the amount of \$650. He sued for nine months rent, which accrued during the occupation by the assignees, less the said payment of \$650—the amount demanded being \$1,750 besides interest.

He only demanded judgment against the assignees for the proceeds of the property of the bankrupt, which was in the building, on which he claims he had a lien. For the balance he asked a general judgment, with the privilege of coming in *pro rata* with the other creditors.

The assignees filed an answer, and with it an account, showing that the proceeds of the estate amounted to \$2,492.40, of which \$1,500 was from the goods in the leased premises; but they claimed credit for the whole amount for the general expenses of the bankruptcy, including their own fees and the \$650 paid to the petitioner, and claimed to have the petition dismissed.

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Messrs. J. H. Kennard, W. W. Howe and S. S. Prentiss,
for petitioner.

Mr. Lionel A. Sheldon, contra.

BRADLEY, Circuit Justice. The position of the assignees is untenable. A landlord cannot prove against a bankrupt's estate for rent which accrues after the bankruptcy; and neither the bankrupt nor the assignee can claim to occupy the leased premises thereafter without paying the rent in full, unless it has been prepaid by the bankrupt. If they continue to occupy the premises they are liable personally for the rent; and the landlord has his lien on their goods on the premises the same as against other tenants. For rent thus accruing after the bankruptcy, the landlord has nothing to do with the expenses of the estate. They are nothing to him. They cannot be deducted from his rent. If an assignee continues to occupy leased premises of the bankrupt, he ought always to make some definite arrangement with the landlord, unless he expects and is willing to pay the accruing rent.

This being the case, the petition for the rent is like any action for rent, and is subject to like rules and proceedings. I think I was mistaken, therefore, in refusing a jury trial in this case. If the assignees wish it they may have it; but the petitioner ought in that case to be allowed to amend his petition and claim a judgment for the whole rent due.

If the assignees elect to let the case stand without a jury, the petitioner may have such judgment as he asks, namely, that the assignees be compelled to pay him the proceeds of the goods which were on the leased premises, less the expenses of sale, and have a judgment for the balance to come in *pro rata* with the other creditors.

The assignees must within ten days, file a written election which course they will pursue.

In re Bailey & Pond.

IN re G. M. BAILEY & POND. Petition of J. M. & J. Lockhart
and Paul Fourchy.

1. One of the members of a bankrupt firm had been the guardian of his own children. The firm was indebted to the children in a large sum, for which the guardian held its notes, payable to himself as guardian, but not indorsed by him to his wards. Under these circumstances, *held*, that the children, having become *sui juris*, were competent to vote as creditors of the firm in favor of a composition proposed by it.
2. One of the said children, being a married woman, voted for and signed the resolution for the composition without producing the authority of her husband therefor; but the husband afterwards made and filed an affidavit that he had given her his authority, and that her vote had his approval. *Held*, that such affidavit was both a ratification and estoppel, and made good the wife's act.
3. Damages for a tort are not provable against a bankrupt's estate until they have been assessed.
4. Unliquidated damages for a tort placed by the bankrupts on their schedule, but denied by them to be a valid claim, were properly excluded from the debts of the bankrupt estate, when it was to be ascertained whether creditors holding one-half the debts had assented to a proposed composition.

This was a petition of review, filed under authority of the second section of the bankrupt act, to reverse an order of the district court sitting in bankruptcy. The facts appear in the opinion of the judge.

Mr John E. Austin, for the petitioners.

Messrs. John H. Kennard, W. W. Howe and S. S. Prentiss,
contra.

BRADLEY, Circuit Justice. The petition of review in this case asks the court to set aside a decree of the district court, made May 2, 1876, confirming a composition made by the bankrupts with their creditors, under sec. 5,103 of the Rev. Stat. and the act of 1874, and directing the resolution of composition to be recorded.

The errors assigned are, that the district court allowed to stand votes amounting in the aggregate to about \$45,000, by the three children of G. M. Bailey, one of the bankrupts, and struck out a claim for damages for \$30,000, which had been placed on the schedule by the bankrupts, thus increasing the vote in favor

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of the composition by three names and \$45,000 in amount, and diminishing the amount of the entire indebtedness by one name and \$30,000 in amount, which changed the result.

There is no charge that the amount voted on by the children was not due to them; but it is alleged that the claim was mostly secured by notes of the bankrupts, given therefor, payable to the order of the said G. M. Bailey, guardian, and not indorsed by him to the children. But if they are *sui juris* and competent to act in their own behalf, I do not see why this fact should prevent them from agreeing to the compromise. They proved their debts regularly, and were entitled to the privileges of creditors. The presumption is, that they were entitled to demand the notes from their father at any time. He holds them merely for their benefit, and if the compromise stands, the claims of the children against the bankrupt firm, whether represented by the notes or not, will be discharged the same as the claims of other creditors. They stand in all respects on an equality with the other creditors.

But it is said that one of the children is a married woman, and voted and signed the resolution without authority of her husband. If she actually had such authority, whether it was exhibited or not, her act would be binding on her and on him. Since this petition has been pending, her husband has made and filed an affidavit in this court that she had his full authority for what she did, and that her votes in favor of the composition had his full approval. He can never go behind this affidavit. It binds and estops him forever. And, as a ratification goes back to the first act and gives it validity, this affidavit, viewed merely as a ratification, validates the wife's acts. But it is more than a ratification. It is a full estoppel and proof against the husband that his wife acted by his authority at the time.

The striking out of the claim of \$30,000 for damages, thereby reducing the sum total of the schedule that amount, presents a question of more difficulty. On the original schedule this claim is put down in the following words:

"Marshall & Bateman, Shreveport, La., merchants, \$30,000, 1873, about. This claim is not admitted. Suit pending in one the district courts, in and for the parish of Orleans, state of Louisiana, for damages alleged to have been sustained by them

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in our agent closing up their store in order to force settlement of debt due us."

Out of abundant caution, the bankrupts put this claim down. They do not admit it at all. They deny it. It does not seem reasonable that a claim which any man may choose to make against another, however futile, can stand as a bar to that other's adjustment and composition of his debts. If so, a man sued for libel, a newspaper proprietor for example, might never be able to get a composition. Persons often sue for \$100,000 or \$200,000, and as often recover nothing at all. This \$30,000 is not put down as a debt, but only as an unjust claim. It has never been proven. It has never been heard from in the bankruptcy proceedings. Surely it cannot be possible that such a claim should stand as a barrier against a composition. There must be some remedy in such a case. Injustice and absurdity can never be law.

By sec. 19 of the original bankrupt act (sec. 5067, Rev. Stat.) it is provided that when the bankrupt is liable for unliquidated damages arising out of any contract or on account of any goods wrongfully taken or withheld, the court may cause such damages to be assessed in such mode as it may deem best; and the sum so assessed may be proven against the estate.

It would appear from this, that unliquidated damages of this kind are not provable until they have been assessed. The claim in question not being provable, and not being admitted to be a valid claim, but denied to be such, I think it was rightfully excluded from the estimate of debts, of which one-half is required to validate a composition. The composition would be good as to the other claims, if not as to that; and as to that, should it ever be substantiated in whole or in part, the composition may not apply. The bankrupt may, perhaps, be subject to the risk of its not applying. On this point it is unnecessary to express any opinion.

The decree of the district court is affirmed.

In re Walshe.

In re WALSHE. Petition of Arnold, Constable & Co. et al

1. A purchase by the brother of a bankrupt and the transfer to him of a large part of the claims against the bankrupt, and the satisfaction at a large discount of other claims by the bankrupt himself for the purpose of assuring the acceptance of a composition proposed by the bankrupt, constitute no reason why the composition should not be confirmed by the court, when it was made to appear that excluding the brother and the claims held by him more than two-thirds in number, and a majority in value of the creditors had assented thereto, and that the evidence of these transactions of the bankrupt and his brother was open and accessible to the assenting creditors.
2. A court of bankruptcy has all the powers of a court of chancery, and proceeds summarily untrammelled by the ordinary rules of procedure. A court of chancery may refer a matter for inquiry as to the facts at any stage of the cause, even on final hearing; therefore.
3. After a motion to confirm a compromise had been brought on for final hearing before the bankrupt court, the judge had the power to refer the matter back to the register to report all the facts of the case touching the proposed compromise.
4. The presence and vote of a creditor who is not lawfully to be accounted such, in favor of a composition, should not nullify the proceedings unless the absence of his vote would change the result.

This was a petition of review brought to reverse an order of the district court sitting in bankruptcy. The facts sufficiently appear in the opinion of the court.

Messrs. John H. Kennard, W. W. Howe and S. S. Prentiss, for petitioners.

Messrs. Thomas J. Semmes and Robert Mott, contra.

BRADLEY, Circuit Justice. On the 10th day of January, 1876, Blaney T. Walshe, of the city of New Orleans, filed his voluntary petition in bankruptcy; and on the 13th of January, he filed a petition for a compromise with his creditors under the 17th section of the act of 1874, offering ten cents on the dollar.

A meeting of the creditors having been called, a resolution accepting the offer was passed, as required by said act, being concurred in by all the creditors present and voting. At this meeting, the bankrupt was examined in presence of the creditors by the attorneys of Arnold, Constable & Co. and Brokaw Bros., who afterwards opposed the composition. He identified a circu-

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lar sent by him to his creditors in December, 1874, offering 25 cents on the dollar, and various other propositions, none of which were accepted in the form proposed. He stated that all of his creditors except Arnold, Constable & Co., Brokaw Bros. and Libby, sold their claims for 25 cents on the dollar to Frederick H. Smith, of Newark, New Jersey, agent for his brother George Walshe, within two or three months of the issuance of the circular. His brother furnished Smith with \$5,000 in cash to make these purchases; the balance, \$2,500, was raised by the petitioner himself in New Orleans. He then explained in detail how his property had gone on diminishing in value by which he was now unable to offer more than ten cents on the dollar.

Arnold, Constable & Co. and Brokaw Bros. thereupon filed a formal opposition to the composition proposed, objecting, amongst other things, to George Walshe being admitted as a creditor on the claims purchased by him, because (as they alleged) he purchased the same for the purpose of influencing the proceedings, and because he had received \$2,500 thereon, which was an unlawful preference.

At the second meeting of creditors on the 14th of February, the register certified that two-thirds in number and a majority in value of all the creditors, and the bankrupt himself had affirmed the resolution for composition, by signing their names to a paper to that effect, which was appended to the report. The register in his report of the proceedings enters into a particular explanation of the various debts. He also bestows attention to the schedule of assets, and concludes by reporting that it was for the interest of all concerned that the composition should be approved and recorded. The paper of ratification annexed to the report shows that twenty-five parties (persons and firms) holding debts over \$50 signed the ratification, including George Walshe as one (who had purchased debts to the amount of over \$19,000 at 25 cents on the dollar, on which he had been paid \$2,500); and that the amount of the debts was \$23,780.88, including that of George Walshe, put down at \$17,498.89. But leaving out him and his debt, the ratification would have in its favor twenty-four creditors in number, and \$6,282 in amount.

In either case, therefore, whether George Walshe were included

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or not included, the composition received the ratification of much more than two-thirds in number, and one-half in value of all the bankrupt's creditors.

But the opponents allege that there was a fraudulent conspiracy between the bankrupt and his friends, particularly his brother, the said George Walshe, and his friend Frederick H. Smith, of New Jersey, to bring about this composition, and much evidence was taken to show that after laborious but unsuccessful efforts to get the opponents to acquiesce in the composition, Smith had advised the bankrupt to get some friend to buy up the other debts at twenty-five cents on the dollar, and to use them when thus bought up to coerce the opponents, and to bring about the desired composition; and that the bankrupt had taken this advice, and had induced his brother to advance \$5,000 for this purpose, he himself raising \$2,500 more, and with these means purchasing up a large part of his debts, retiring those which had been purchased with his own money, and procuring the others to be assigned to his brother. There was evidence, however, to show that George Walshe would not have the business transacted in any other way than by an assignment to him of his share of the purchased claims. Be this as it may, it seems that after throwing all these claims out, and not even allowing George Walshe to come in as a creditor at all, considerably more than the requisite majority of creditors in number and amount ratified the composition. And then, the evidence of all these transactions was open and accessible to the ratifying creditors, if they had chosen to examine it. If they were satisfied that the composition was for their interest, and for the interest of all concerned, there does not appear to be any very cogent reason why the purchase of the bankrupt's debts by his brother should interfere with it. No pains appears to have been taken by him to conceal what he was doing. On the contrary he was very frank in stating the whole of the transaction.

But to avoid every cavil, the court took the pains (and this is assigned for error) to refer it back to the register to ascertain and report all the facts of the case, and especially whether the creditors who had ratified the composition understood the matter of the purchase of the bankrupt's debts, and the part taken in it

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by him, his brother and Smith. A full and detailed report was made by the register, and the court made a final decree confirming the composition. This decree is brought here for review, and various errors are assigned.

It is objected that the court had no power to refer the matter back to the register, after the case had been brought on for final hearing. But this is clearly a mistake. The court of bankruptcy has all the powers of a court of equity, and proceeds summarily, untrammelled by the ordinary rules of procedure. And a court of chancery may refer a matter for inquiry as to the particular facts at any stage of the cause. It may even direct a feigned issue at the final hearing.

Again, it is objected that George Walshe was not a lawful creditor, and should not have been accounted as such in the vote of ratification. We have seen that his vote made no difference. The result would have been the same if he and his claim had been stricken out. I do not think that the presence and vote of a creditor, who is not lawfully to be accounted such, should nullify the proceedings, unless the absence of his vote would change the result. If a compromise could be nullified by the presence of an unlawful creditor, few compromises would be safe.

These views render it unnecessary to discuss some other questions which were mooted in the case. For example, it is contended that the deposit in bank, to the credit of the bankrupt, of the \$5,000 received from his brother, made the money his own. In law, and as between him and the bank, this might have been so. But if he was really the agent or trustee of his brother, that relation would not be destroyed by depositing the money in his own name, or even by using it in the purchase of other property. This point, however, has become immaterial in the cause.

The decree of the district court is affirmed.

Paul vs. The Bark Ilex.

JAMES PAUL vs. THE BARK ILEX.

A stevedore has no maritime lien upon a ship, for his services in loading and stowing her cargo.

ADMIRALTY APPEAL.

Mr. B. C. Elliott, for libellant.

Messrs. C. B. Singleton and R. H. Browne, for claimant.

BRADLEY, Circuit Justice. This is a libel *in rem* against a foreign ship, bound on a foreign voyage, for services as stevedore in loading timber on the ship. A stevedore has never been held to have a claim against the ship itself for his services; on the contrary, the claim has been uniformly rejected. Judge Betts, in *Cox v. Murray*, 1 Abb. Adm., 342, 343, undertakes to explain why the loading of a ship with cargo preparatory to a voyage, is not a maritime service, whilst the furnishing of repairs and supplies preparatory to such voyage is a maritime service. He seems to think that the maritime quality arises only when the matters performed or entered upon pertain to the fitment of the vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as the instrument of a voyage; but that services only incidentally benefiting a voyage have not this quality. Judge Lowell thinks this not a very satisfactory explanation, because a ship cannot be used to advantage without a cargo any more than without repairs and supplies. As, however, the precedents are all one way, I do not feel at liberty in this court to disregard them, and the views expressed by Mr. Justice Grier, in *McDermott v. The Owens*, 1 Wall. Jr. C. C., 371, are so clear and forcible, that I am not certain that I should come to a different conclusion if the question were a new one. He says: "The stevedores are usually employed by the owner, consignee, or master, on their personal credit; the service performed is in no sense maritime, being completed before the voyage is begun, or after it is ended, and they are no more entitled to a lien on the vessel than the draymen and other laborers who perform services in loading and discharging vessels."

The decree of the district court is affirmed.

The United States ex rel. Ranger vs. The City of New Orleans.

THE UNITED STATES ex rel. MORRIS RANGER vs. THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEW ORLEANS. THE UNITED STATES ex rel. W. S. PETERKIN vs. THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEW ORLEANS.

1. The purpose of the writ of *mandamus* is to enforce, not to create legal duties.
2. It will not issue to compel officers of municipal corporations to levy and collect a tax unless the legislature has, either expressly or by implication, made it the duty of such officers to levy and collect such tax.
3. The imposition of taxes is the exercise of a legislative, not of a judicial function.
4. A general statute of Louisiana prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same full provision was made for the payment of principal and interest; at the same time a special statute prescribed the form of the ordinance by which a particular debt might be created, and declared that such ordinance must be submitted to the legal voters of the corporation, and the assent of a majority of such voters was made a condition of its validity. *Held*, that where such ordinance, so submitted to the voters for their approval, contained no provision for the levying of any tax to pay the principal of the debt, but did contain another provision, which was evidently deemed ample for such purpose, it was the evident intention of the legislature that the principal debt should not be paid by taxation, and in such case the writ of *mandamus* to compel the levy of a tax to pay such principal was refused.
5. The acts of the legislature and the ordinance mentioned in the preceding headnote being in force, and the statute having declared that certain stock therein named should be perpetually pledged for the payment of the principal of the debt which the municipal corporation was, by the same statute, authorized to contract, the predecessors of respondents made a sale of said stock for the sum of \$350,000, which sum had long since been spent for other purposes, and no part of which was, or ever had been, in the possession or under the control of respondents. *Held*, that relators were not entitled to the writ of *mandamus* to compel the application of the sum of \$350,000 to the payment of the principal of their debt.

These were applications for writs of *mandamus*, to be addressed to the mayor and administrators of the city of New Orleans, comprising the common council thereof, commanding them to levy and collect a tax sufficient to pay the principal of certain bonds issued by the city in the year 1854.

The return made by the respondents showed the following to be the facts: In the year 1854, the general assembly of the state

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of Louisiana authorized the city of New Orleans to subscribe for stock in certain contemplated railroads centering in said city. To pay for said stock, the city was authorized to issue bonds equal in amount to the stock at its par value (see acts 1854, Nos. 108, 109, 110). Judgments had been obtained in this court for the principal of the sum named in said bonds, and an execution had been issued thereon, which had been returned *nulla bona*. The return then alleged that there was no provision in these statutes, or any other statute of this state, for the levying and collection of this tax, and referred to this statute, especially the second section, to show that the legislature did not intend that any tax should be levied to pay the principal of these bonds, but that it intended that the principal should be paid out of the stock and its revenues.

To this return the relators demurred, and the question was, whether upon this state of facts the court would grant the writ.

Messrs. T. J. Semmes, Robert Mott, Thos. Allen Clarke, Thos. L. Bayne, H. B. Kelley and D. C. Labatt, for relators.

Messrs. B. F. Jonas, City Attorney, John Finney and H. C. Miller, for respondents.

BILLINGS, District Judge. I think the proposition cannot be questioned that this court is without authority to direct a levy of a tax unless it be in accordance with the provisions of some law which makes it the duty of the city common council to levy the same. In other words, that this court cannot create, but can only enforce a clear legal duty.

MR. JUSTICE BRADLEY, in *Heine v. The Levee Commissioners*, 1 Woods, 246, 247, whose decision was affirmed by the supreme court, says: "The power of taxation belongs to the legislative branch of the government. The judicial department has no general power over the subject. If the officers who are charged with the duty of levying or collecting taxes refuse to perform their functions, the courts, in a clear case of failure, and at the instance of the party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all the judicial department can do on the

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subject, unless the legislature has expressly conferred upon it further powers."

The question is, Has the duty or power to levy this tax been committed by the legislature to the city administration?

It is urged by the counsel for the relators that prior statutes, namely, those of 1835 and 1836, gave this authority, and that the power to levy and collect a tax may be fairly deduced from the permission to contract the debt.

The act of 1835, section 6, provides: "The said mayor and city council shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving and watering the streets of the said city; for supporting the city watch, the levee of the river, the prisons, workhouses and other public buildings, and for such other purposes as the police and good government of the said city may require." It seems to me that subscriptions to works of internal improvement are excluded from all the purposes here specified.

The act of 1836, p. 31, sec. 4, continued to the several municipalities into which the territory of the old city was then divided, the powers of the old corporation, and those powers were again continued when the different municipalities with additions were consolidated. But there is here no power given to levy this tax.

This brings me to consider the second and principal point urged by the relators' counsel, viz: That the legislature, by authorizing the incurring of the debt, authorized the levy of the tax to pay it.

The decisions of the courts of last resort of several states were cited, which it is not necessary for me to consider, because they depend upon the statutes of these states; nor need I, upon this point, refer to more than one decision of the supreme court of the United States. The result of what it has said upon the general subject may be summed up in this: It has held that the collection of judgments of the United States courts may be aided by *mandamus* whenever there is a refusal or failure on the part of the officers to perform any ministerial act clearly imposed by law; it has treated the repeal of laws in force at the time of the

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issuance of the bonds, and which carried with them substantial rights, as void; and, generally, has given in behalf of parties obtaining judgments in the courts of the United States, the same aid to which parties similarly situated would have been entitled in the courts of the state in which the cause of action arose; but it has never assented to the unqualified proposition that legislative permission to issue bonds carried with it the authority to tax.

The principle upon which alone such a deduction is maintainable is, with its appropriate restrictions, clearly stated by Mr. Justice Miller in the case of the *Loan Association v. Topeka*, 20 Wall., 655. The question was as to the validity of certain interest coupons upon which an ordinary suit had been brought. The defense was that taxation could only be invoked for purposes distinctively public, and that permission to issue the coupons carried with it the right to a tax to pay them, and that as the purpose for which these coupons were issued was not a public one, the statute authorizing them and the obligations themselves, were void. He had said that ordinarily the debt of municipal corporations had to be paid by means of taxation.

He adds (p. 660): "It is therefore to be inferred that, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

I think it to be indisputable that the absence of any permission by the legislature for a tax, and the substitution of some other means of payment which was deemed fully adequate, would as completely repel the inference that a resort to taxation was intended, as would a restriction upon the power of taxation itself.

Now, it is urged by the counsel for the city, that the statute by which these bonds were authorized shows that the legislature intended that the principal should be paid by means other than taxation. An examination of this statute has convinced me that the belief of the legislature was that the principal sum could, and its intent was that the principal sum should, be paid out of the stock and its revenues. The act pledges in perpetuity the

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stock for that purpose; it gives the right to the bondholder to convert his bond into stock; it provides that all dividends derived from the stock above six per cent. should be devoted to extinguish the principal; and while providing with extreme rigor for the payment of the interest, in case dividends from the stock should not be altogether sufficient, and, while providing that until the ordinance levying this yearly tax to pay the interest had been passed by the common council, no valid resolution could be adopted, it is profoundly silent as to any tax to pay the principal. The implication is that the legislature intended the bondholder should, for the collection of the principal sum, look to the stock, at least to the exclusion of taxation.

But, among the statutes of the state, with reference to the city of New Orleans, and among the general statutes of the state, are found acts that give the absence of any particular means of payment in a city ordinance creating a debt a special significance. The act of 1852, No. 51, entitled "an act to consolidate the city of New Orleans and provide for the government," etc.; section 37, page 54, contains the following provision: "And no ordinance (of the city of New Orleans) creating a debt or loan, shall be valid, unless for some single object, or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or the debt incurred."

The act of 1853, No. 258, p. 234, provides "that the police juries of the several parishes of this state, and the constituted authorities of incorporated towns and cities in this state, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

A subsequent section provides that "whenever police juries or authorities of incorporated towns or cities shall have provided for the payment of a debt by levying a tax, and shall fail or refuse to cause said tax to be collected, the court rendering judgment may issue its mandate," etc.

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Now, since the general statute, and the statute with reference to the city of New Orleans, struck, with nullity, all obligations of cities, unless the ordinance creating the same, fully provided for the payment; and since one of the same statutes makes special enactments with reference to cases where "the provision for payment shall be by levying a tax," thereby showing that taxation was included in the term "means," it seems to me, that, when a contemporaneous legislature authorized a city to issue bonds and prescribed the form of the ordinance which the city common council should adopt, creating the obligation, the failure of such ordinance, to prescribe any provision for taxation, and the insertion in such ordinance of other means of payment which appear to have been deemed abundantly adequate, of itself, repels the inference that taxation was intended.

The legislature knew that the ordinance was void unless it contained full provision for payment. It meant, therefore, to set forth all the "means" which were to be considered as provided, and any addition of means by way of inference is excluded.

It follows, therefore, that since the legislature of the state of Louisiana has not by any general or special statute expressly or by implication made it the duty of the common council to levy this tax, this court is without any authority to direct its imposition.

It remains for me to consider the special circumstances in the case of Morris Ranger. The petition alleges, and the return admits, the sale of this stock by the predecessors of the present common council, provided they had the power to sell the same, and that they received therefor the sum of \$320,000. The return then states that "no part of said proceeds of said so called sale is now in the treasury of the city, or in the possession, or under the control of these respondents; that the said proceeds have long since been used and expended, and no portion thereof ever came into the possession or under the control of these respondents, the present authorities of said city. These respondents show that no writ of *mandamus* can issue to compel the payment of the relator's demand out of said proceeds, because said proceeds are not in existence." Courts cannot issue a writ commanding the performance of an admitted impossibility.

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If there are no funds arising from this sale in the treasury of this city, now under control of respondents, and they were spent years since by respondents' predecessors, then it would be idle to issue a mandate to the respondents to pay the relator out of them. Whatever may be the remedy of the relator by reason of the special facts of this transaction, it is clear that he is not entitled to a *mandamus*.

Let the demurrers be overruled, and the writs of *mandamus* refused.

FRANK F. CASE, Receiver of the First National Bank of New Orleans, vs. THE NEW ORLEANS & CARROLLTON RAILROAD COMPANY et al.

A creditor's bill which sought to follow as trust money, funds of a bank invested by its officers in a railroad company, was dismissed, on the ground among others that the identity of the property purchased with the money of the bank could not be ascertained: *Held*, that such decree was a bar to a new bill brought for the same purpose, and substantially the same as the first except that it contained an averment which was not in the first bill, to the effect that the complainant had reduced to judgment his claim against the officers of the bank for the misappropriated funds.

IN EQUITY.

This cause was submitted on the bill, pleas, replication and evidence.

The bill alleged in substance that G. T. Beauregard, Thomas P. May and A. C. Graham formed, about the 18th of April, 1866, a partnership under the name of G. T. Beauregard, Lessee; that said partnership leased from the New Orleans & Carrollton Railroad Company, for a term of twenty-five years, its railroad and other property appurtenant thereto, and spent large sums of money in repairing and rebuilding said railroad, and in purchasing real estate for the use of said road, which real estate is described in the bill.

It is further alleged that all or nearly all the money paid out by Beauregard, Graham and May, for the purchase of said lease

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and expended in making improvements on and equipping said road, and in conducting its business, was obtained from the said First National Bank; that the partnership opened an account with the bank in the name of "G. T. Beauregard, Lessee," and became indebted to the bank for money advanced in the sum of \$237,008.

The bill further stated that the complainant, in his capacity of receiver of said bank, brought suit on the law side of this court against said partners Beauregard, Graham and May, on their said indebtedness; and that on the 26th of February, 1873, he recovered a judgment against Beauregard and May for \$79,002 each, that being their respective virile shares of said debt as ordinary partners, but that Graham, not having been found, no judgment was or could be rendered against him. Executions were issued on said judgments and returned *nulla bona*.

The bill further averred that the bank had a lien and privilege upon all the property of the partnership, and had a right to be paid out of the same in preference to creditors of the individual partners.

The bill further alleged that Graham and May had conveyed their interest in said property, that the partnership assets came into the possession and ownership of Beauregard and certain other persons, to wit, Bonneval, Binder and Hernandez; that in consideration that said railroad company would assume all the debts of said partnership of "Beauregard, Lessee," and give to said Beauregard, Bonneval, Binder and Hernandez, 4,000 shares of the capital stock of the company, they transferred to the said company the said lease and all the other property belonging to said partnership of Beauregard, Lessee. The bill charged that these transfers to Bonneval, Binder and Hernandez, and from them and Beauregard to the railroad company, were made with a full knowledge on the part of the transferees of the rights of the bank in the property transferred.

The prayer of the bill was that the court would decree that there was due the complainant, as receiver as aforesaid, from the partnership of Beauregard, Lessee, the said sum of \$237,008 with interest, and by each of the partners one third of said sum; that the New Orleans & Carrollton Railroad Company might

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be condemned to pay to him the sum so due, as aforesaid, from said partnership, and that all transfers and conveyances of said partnership property might be declared void.

The plea in bar filed by the defendants to this bill was to the effect that on the 4th of June, 1870, the said complainant had filed his bill in this court against the same corporation and the same natural persons as are defendants in this bill, setting forth substantially the same cause of action and praying the same relief as is sought in this suit; that defendants had answered said bill and the complainant had filed a replication to the said answer, and testimony was taken by both parties, and on the 14th of June, 1871, the cause was submitted to this court, which on the 15th of June, 1871, rendered a decree dismissing the complainant's bill with costs.

To this plea the complainant filed his replication, and the cause was submitted upon the issue thus formed.

Messrs. J. D. Rouse and W. W. King, for complainant.

Messrs. John A. Campbell and Henry C. Miller, contra.

Woods, Circuit Judge. The evidence submitted to sustain the plea, to wit, the record and decree of the court which is pleaded as a bar to this suit, shows that the bill in the former case made substantially the same averments with a single exception, to be hereafter noticed, and prayed the same relief as the present bill. The averments in the present bill not contained in the former one are those to the effect, that the complainant had recovered judgments against Beauregard and May, in an action at law each for his virile share of said indebtedness, that execution had issued and been returned *nulla bona*; that May had gone into bankruptcy, and that Graham was out of the jurisdiction of the court. The first bill, however, averred that Beauregard, Graham and May were all insolvent.

It is evident that the substantial difference between the two cases lies in this, that the first bill lacked the averment which the present bill contains, that the claim of the complainant against the partnership of "Beauregard, Lessee," had been sued to judgment as against Beauregard and May, and that execution had been issued thereon and returned unsatisfied.

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The answer to the first bill insisted that the various transfers by which the railroad company acquired title to the property of the partnership of Beauregard, lessee, were valid, and the title of the company indefeasable, denied that the complainant or the bank ever had any lien or privilege thereon, or that said property was in any manner bound for the indebtedness of said partnership, or that the railroad company ever assumed or bound itself for the same, and denied all the allegations of the bill charging said company or said property acquired by it with any liability whatever to complainant or the bank of which he was receiver.

The original case was tried at the April term, 1871, of this court, by Mr. Circuit Justice Bradley, by whom it was decided in a written opinion to be found in 1 Woods, 125.

One of the grounds upon which the court decided against the complainant and dismissed his bill is stated, as shown by the report, as follows:

“The first ground of relief, namely, that the property belongs to the bank, or is held in trust for the bank, because purchased with the money of the bank, is clearly untenable. Beauregard & Co. were engaged in business which required a considerable amount of funds, and became large borrowers of the bank. With the money thus obtained, and with other money derived from the proceeds of their business and other sources, they paid expenses, made repairs, bought cars, horses, and other property, and found themselves at the end of the year largely behind. The bank is their creditor, and considering May's peculiar relations, it has cause to make a charge of official misconduct against him; but how can that entitle the bank to claim the property of the firm as its own? The identity of the property purchased or procured with the money of the bank cannot be ascertained. It was mingled with the other money of the firm, and the whole mass was indiscriminately used for all the purposes of the company. Can the receiver point to a single car, or horse, or lot of ground, and say, this was purchased with the money of the bank? Other creditors of the firm have become interested, and nothing but inextricable confusion would ensue if any such claim were allowed to prevail.

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“Where trust property is converted and the proceeds can be identified, it may undoubtedly be followed by the *cestuis que trust*, and brought back to be appropriated to its original purposes. Money of a bank misappropriated or embezzled by its officers may undoubtedly be followed up in the same way, if the money itself or its proceeds can be identified, and no innocent person is injured by its recovery. But supposing the money now in question could be regarded as thus misappropriated, the impossibility of identifying it and of doing justice to third parties, renders the application of the principle impracticable.” See *Case, Receiver, v. Beauregard et al.*, 1 Woods, 128, 129.

This ground, upon which, among others, the bill was dismissed, is entirely independent of the fact, whether the claim of the complainant had been reduced to judgment or not. The court, in effect, has decided, that with or without a judgment, the relief prayed by the bill cannot be granted. The case, in every shape it may assume, has been decided against the complainant and the bill dismissed. He cannot relieve himself of the effect of the decree of dismissal by putting his claim in judgment. That would be simply to add an entirely immaterial fact to the case he had made by his first bill.

The present bill, as already stated, differs from the bill which was dismissed in the single fact, that it avers that the debt due to complainant had been reduced to judgment. The court is, therefore, asked to decide, whether this fact changes the title of the complainant to the relief he prays. The court has, in the first case, decided that precise question, and held that it does not. The questions presented by this bill have been decided by this court. They cannot be raised again by adding an immaterial fact to the record.

In my judgment, the plea is sustained by the proof, and there must be a finding and decree for defendants, and the bill must be dismissed with costs.

Barker vs. Barker's Assignee.

HEIRS OF ELIZABETH BARKER vs. JACOB BARKER'S ASSIGNEE.

A bill of review can only be sustained upon the ground of error apparent on the record, and the record consists of the pleadings, proceedings and decree, and does not include the evidence.

IN EQUITY. Bill of Review.

Heard for final decree on bill, demurrer, plea and answer of defendant.

The bill of review was filed for the purpose of reversing what was alleged to be an erroneous decree of the district court, after the time for appeal had passed by.

The bill of review set out the substance of the original bill, and averred, that after service of process, the defendant had filed an answer which contained a general denial of all the averments of the bill; that upon the final hearing, the court had rendered a decree in favor of complainants against the defendant for the sum claimed by them, to wit, \$7,300, and directed the defendant to place the complainants as ordinary creditors upon the tableau of distribution.

The bill of review alleged, that Jacob Barker was seized before his bankruptcy of certain real estate in the city of New Orleans, on which complainants had a lien in the nature of a tacit mortgage for the amount of their claim; that the property was sold by the assignee of Barker, and the complainants were allowed by the order of the court to set up their claim to the fund, the proceeds of said sale.

The error assigned by the bill of review was, in not recognizing the lien or privilege of the complainants on this fund, and in not directing the claim to be paid out of the proceeds of the property on which the alleged tacit mortgage rested, instead of simply directing them to be placed on the tableau of distribution as general creditors.

Messrs. Henry B. Kelly and D. C. Labatt, for complainants.

Mr. John A. Campbell, for defendant.

Woods, Circuit Judge. A bill to review can only be sustained

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on the ground of error in law, apparent on the record. 1 Spence Eq. Jur., 393.

On a bill of review, nothing can be examined but the pleadings, proceedings and decree, which, in this country, constitute what is called the record. The proofs cannot be looked into as they can on appeal. *Putnam v. Day*, 22 Wall., 60.

It is well settled, that a bill of review for error, apparent upon the decree, must be for error in point of law, arising out of facts admitted by the pleadings or recited in the decree itself, as settled, declared or allowed by the court. *O'Brien v. Connor*, 2 Ball & Beatt., 146; *Mellish v. Williams*, 1 Vern., 166; *Webb v. Pell*, 3 Paige, 368; *Tommey v. White*, 1 H. of L. Cas., 160.

The complainants, while conceding these to be the rules governing bills of review, claim that after allowing the debt of the complainant to be a valid claim against the estate of Barker, it was error to refuse to give it a lien and privilege on Barker's real estate, or the fund which was produced by its sale; that upon the record it appears that if the claim were allowed, the lien followed as a matter of law. I cannot assent to this conclusion. The lien upon the real estate of Jacob Barker claimed by the original bill is based upon the averment that the money which was the basis of the claim was the separate, dotal and paraphernal property of Elizabeth Barker, his wife, and as such, came into his hands under the law of Louisiana. This averment is denied by the answer. Besides, it is nowhere directly averred in the original bill that Jacob Barker ever had any real estate to which the tacit mortgage could attach. It is true, it is averred that Norton, his assignee, had sold and disposed of all the real estate in New Orleans surrendered by Jacob Barker. But this averment, and all others of the original bill is distinctly traversed by the answer. While, therefore, the court may have found that Jacob Barker's estate was indebted to the complainants, it may also well have found that he owned no real estate on which the alleged tacit mortgage could rest. We cannot look into the proofs. We must take the bill, answer, replication and decree to see whether there is any error apparent on their face. Excluding the evidence, it is impossible to say that there was any error in the decree. As it does not so appear on the face of the record,

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and can be made to appear in no other way, the bill of review must be dismissed at complainant's costs.

M. & J. MEAGHER VS. THE STEAMBOAT LIZZIE.

Where, on a libel *in rem* to recover for repairs to a steamer, the jurisdiction of the district court was submitted to and the cause tried on its merits; after appeal to the circuit court, the claimants could not for the first time set up that the repairs were made in the home port of the steamer, and therefore did not create a maritime lien, no such fact being averred in the pleadings or shown by the evidence.

ADMIRALTY APPEAL.

Mr. B. Egan, for libellants.

Mr. Thomas Gilmore, for claimants.

BRADLEY, Circuit Justice. This suit was brought to recover a balance claimed by the libellants to be due them for repairs made to the steamer Lizzie.

The point is taken by the claimants in this court for the first time, that the repairs were made to the steamer in her home port, and therefore did not create a maritime lien. This point is made too late, and is not tenable now. It is not made by the pleadings, nor was it made in the district court, and I cannot find anything in the evidence even to show that the Lizzie belonged to the port of New Orleans when the repairs were made. The jurisdiction of the court was submitted to, and the cause tried on its merits. The objection cannot be raised now.

Morgan vs. The New Orleans, Mobile & Texas Railroad Company.

CHARLES MORGAN vs. THE NEW ORLEANS, MOBILE & TEXAS
RAILROAD COMPANY et al.

1. Where charges of fraud and misrepresentation in procuring a contract, which has been partly performed, are made as the ground for setting it aside, and where a rescission would involve the upsetting of many large and important transactions, the proof should be made clear to justify a court in making the decree prayed for.
2. As a general rule a contract is to be governed as to its interpretation, nature, obligation, performance or dissolution, by the law of the place where it was made.
3. The principal exception to this rule is where the contract is made in one state or sovereignty, to be performed in another; in that case it is to be governed by the law of the place of performance.
4. But where a contract is made in one state, to be partly performed there, and partly performed in several other states, the contract is to be governed by the law of the place where it is made.
5. But in such a case where, in the performance of the contract, conveyances and transfers are to be made of property situate in several states, consisting of realty or other property subject to the local law, the conveyances and transfers should be made in accordance with the *lex rei sitæ*.

IN EQUITY.

Heard on pleadings and evidence for final decree.

This bill was filed to obtain the rescission of a certain contract made between the complainant and the New Orleans, Mobile and Texas Railroad Company, on December 12, 1871. The rescission was asked for on two grounds; first, on the ground of a fraudulent misrepresentation of facts by which the complainant was induced to enter into the contract; secondly, on the ground that the contract was a commutative one, and that the railroad company had not performed its part of it. The latter ground was based upon the peculiar law of Louisiana by which, according to the civil code, articles 2045, 2046, "the dissolving condition is that which when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed;" and such "resolutive condition is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements."

Messrs. R. H. Marr, H. J. Leovy, and F. A. Monroe, for complainant.

Mr. John A. Campbell, for defendants.

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BRADLEY, Circuit Justice. The contract in this case was made for the purpose of putting an end to a ruinous competition which was being carried on between the two parties to it, in the freight and passenger business between Mobile and New Orleans, and for uniting their interests in that business and in a projected railroad business between New Orleans and Texas. The complainant Charles Morgan was, and had long been, engaged in running a line of steamers between Mobile and New Orleans, the line being supplemented by a short railroad running from Lake Pontchartrain to the latter place, called the Pontchartrain Railroad, of which he owned the majority of the stock. He also owned a railroad called the Opelousas road which ran from the Mississippi river opposite New Orleans to the Atchafalaya river at Brashear City, where it connected with a line of steamers running to Galveston and other places on the Texan coast, being connected with the city of New Orleans by means of a ferry at that place. The complainant also had a charter for a continuation of his railroad from Brashear City westwardly and northwesterly to the Texas state line. The railroad company, at the time of the contract, had recently completed a railroad between Mobile and New Orleans, on which the opposition before referred to was maintained against the steamboat business of the complainant; and they had procured a charter for a railroad from New Orleans to the state line of Texas, and expected to obtain a charter for a continuation of the said road to Houston in that state; and had actually constructed a road west of the Mississippi, from opposite New Orleans, as far as Donaldsonville.

Under these circumstances, it became evidently the interest of the parties in some way to compose their differences, and not to continue an opposition which must result in loss to them both. The transportation route between Mobile and New Orleans, being divided between two powerful interests, could not be a very valuable property to either of them unless some amicable arrangement could be made. By the agreement in question, an attempt was made to form such an arrangement.

The general nature of it was as follows: Morgan, on his part, agreed to convey to the railroad company and the company agreed to purchase the property which he had in the line between

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Mobile and New Orleans, for the sum of \$797,800, namely, certain wharves and wharf property at Mobile, two steamers, the *Laura* and the *Frances*, and his Pontchartrain Railroad stock, amounting to 5,078 shares, out of 7,500 shares, which constituted the whole capital. He further agreed to convey to the company, for the sum of \$250,000 and interest thereon from April 15, 1870, his railroad rights and partly constructed road between Brashear City and Vermillionville, about sixty miles, and from thence west and north to the Texas line and to Red river; the company agreeing to complete said road by the time it should complete its main line from Vermillionville to the city of Houston. Morgan further agreed to subscribe to the stock and securities of the railroad company, the sum of \$1,258,000, on the same terms as the other subscribers thereto had done, and the price of the property above named was to be taken as payment of his subscription as far as it would go; the balance to be paid by him in cash. The securities to be received by him for his said subscription were to be \$899,000 first mortgage bonds of the company on its road west of the Mississippi, and \$359,000 of second mortgage bonds guarantied by the state of Louisiana. He was also to receive (like the other subscribers) income bonds and stock of the company of each, to the amount of his subscription. It was also stipulated in the agreement that Morgan should have for the sum of \$250,000 cash, that portion of the Pontchartrain Railroad running along the levee in New Orleans, and the new depot thereto attached. The purpose of the agreement was declared to be to put an end to the opposition in the passenger and freight business between Mobile and New Orleans, and to concede the whole business to the company; and Morgan agreed to take off his boats within fifteen days, and not to run or be concerned in steamboats on that line for fifteen years thereafter. It was further agreed that the gross receipts of the through business by railroad between New Orleans and Houston should, on the completion of the railroad through to the latter city, for seven years thereafter, be stocked and divided between the parties according to the length of railroad owned by each, namely, Morgan's road from New Orleans to Brashear City, and the company's road from New Orleans

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to Houston, including the branch from Brashear to Vermillionville.

The agreement was made and executed in the city of New York, where Morgan and the officers and most of the directors of the company resided; and immediately after it was made, measures were taken to execute it and carry it into effect; and in the course of the following January, February and March almost every article was executed. Morgan subscribed the requisite amount to the securities of the company, in New York, namely, the sum of \$1,258,000, and received the bonds and certificate of stock which the agreement called for, and conveyed and transferred to the company the several pieces of property which he was to convey and transfer, namely, the wharves and wharf property in Mobile, the steamers Laura and Frances, the Ponchartrain Railroad stock, and the railroad property and rights northwest of Brashear City; and paid the cash balance required to make up his subscription; and he also received a conveyance of the Ponchartrain Railroad track along the levee in New Orleans, and paid for it the sum of \$250,000 in cash. In fact, within three months from the time of making the agreement, everything was done to effect a complete execution of it, except the construction by the company of the railroad to Houston, including the branch road from Brashear to Vermillionville.

In addition to this, the firm of C. A. Whitney & Co., of New Orleans, who were the general agents of the complainant in that city, and had managed for him the business between Mobile and New Orleans, and were still managing his line between New Orleans and Texas, were appointed as the agents of the railroad company, and acted as such for several months, namely, from the date of the agreement in December, 1871, until the latter part of the following April, and Morgan and three or four persons named by him were elected directors of the company in place of others who resigned. In the summer of 1872, the complainant changed the gauge of his road from New Orleans to Brashear City, so as to correspond with that of the defendants, and to be thus prepared for the through business to Houston, and in July he received one installment of interest on the bonds received by him. The defendants on their part, during the spring and sum-

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mer of 1872, did some work on the line of road between Bra-shear City and Vermillionville, but never laid any rails there, and entirely suspended operations before the first of September; and nothing further has ever been done on that branch, nor has the road been completed from Donaldsonville to Vermillionville, nor has any part of it been constructed between Vermillionville and Houston. The time when, by the act granting state aid to the company (on which great reliance was placed), and when by express agreement with the state of Louisiana, the railroad company was to complete its road to the state line, was the 7th of May, 1873; and it was to complete the line to Houston within six months thereafter if the requisite legislation could be obtained from the legislature of Texas.

In consequence of the failure of the company to furnish funds to pay its debts in Louisiana, and to go on with the work of construction of the railroads in contemplation, Whitney & Co. resigned the agency of the company in the latter part of April, 1872, and they and Morgan resigned their position as directors. But no formal demand to have the agreement rescinded was made by the complainant until he filed the bill in the present case, which was on the 30th of May, 1873, shortly after the expiration of the time for completing the road to the Sabine river.

The bill states, and it is not denied, that the company failed to pay interest on its securities as early as October, 1872, and that the trustees of the first mortgage of the road between Mobile and New Orleans had taken possession thereof, and had received the sanction of the court thereto; and that proceedings had been commenced for a sale of the franchises and property west of the Mississippi.

By an amended bill, it is stated that James A. Raynor and Edwin D. Morgan were in possession of the company's road east of the Mississippi, claiming to be in possession as trustees under their first mortgage on that part; and that Frank M. Ames was in possession of the road west of the Mississippi, under a like claim, as trustee under the first mortgage on that part; and they were made parties to the bill, and have severally put in answers setting up their respective claims under said mortgages.

The bill, after setting out most of the foregoing facts, alleges

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by way of gravamen, that in the negotiation which took place in New York preliminary to the making of the contract, certain statements and representations were made to the complainant by a committee of the directors of the company, respecting the condition of its affairs, which he was assured were accurate and true, but which he has since discovered to have been false. The bill states that the committee referred to exhibited to the complainant a certain paper (which is referred to as Exhibit E), containing a statement of the condition of the company at that time, showing that the assets of the company then in its possession and available for the construction and equipment of the main line of road to be built from New Orleans to Houston, Texas, and of the branch from Brashear city to Vermillionville, amounted to the sum of \$7,551,000, being composed of \$4,255,000 of bonds of the company at par, \$4,140,000 of Louisiana state bonds, at eighty cents on the dollar, and \$1,500,000 second mortgage bonds, at sixty cents on the dollar, and a balance of \$488,000 of first mortgage bonds in the Calcasieu division, all being subject to an amount of \$1,404,000 that would be due to original subscribers to a certain fund of "two millions of dollars." Also, that the committee exhibited to the complainant another paper (which is referred to as Exhibit F), which was represented to contain new subscriptions of sums of money to be applied to the construction and equipment of the said main line from New Orleans to Houston; that it had sixty-six names, with an amount affixed to each name, making a total of \$4,895,700; and that the subscribers were represented to be, with two or three exceptions, possessed of large means, and able and willing to pay; and that the committee represented that the subscriptions were made in good faith, to furnish the funds required to construct and equip the said railroad west of the Mississippi; and that with the said assets in hand and said subscriptions, if the complainant also became a subscriber for a liberal amount, upon the same terms as the other subscribers, the company would have ample means to construct and equip the said railroads and have them in operation at the period contemplated by the charter.

The bill alleges that the representations were not true, and were made in bad faith, to deceive the complainant and induce

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him to act, in relation to said proposed arrangement, in error of facts as to the condition of the company in regard to the possession of the means requisite for the construction and equipment and putting in operation of the said railroads, and in regard to the immediate intent of the company to prosecute and complete the same. The Exhibits E and F were produced in the evidence taken in the cause, and are before the court.

The fact that after the agreement was made, very little of these large amounts of money was forthcoming, even to pay the floating debt of the company, and that very little was expended during the following season on the works, and that the company was obliged absolutely to suspend operations in October, 1872, was sufficient, if the complainant understood the representations as stated by the bill, to raise in his mind the strongest suspicions that he had been deceived and duped.

The answers furnish but little light on the subject. They are not sworn to, and consequently are not evidence. Those of the trustees of the several mortgages are filed by them as such trustees, and claim that they are not affected by any rights of the complainant growing out of the transactions between him and the company.

The evidence is more to the point. (Here the learned judge went into an elaborate discussion of the evidence. This discussion is omitted.)

In charges of this kind, laid as a ground for setting aside a contract where many things have been performed on both sides, and where a rescission would involve the upsetting of many large and important transactions, the proof must be very clear indeed of fraudulent misrepresentation or concealment, to justify a court in applying the judicial knife to the case. It must be clear that there has been such a misstatement of the facts as to mislead the injured party, and to induce him to enter into the transaction; and he must be prompt to avail himself of the objection as soon as it is discovered. He must not wait to experiment and see whether it may not, after all, turn out well. Acquiescence for a little time, in such cases, is condonation.

I am not satisfied that there was any such misrepresentation

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of facts in this case as, under the circumstances, entitles the complainant to set aside the contract.

The next question is, whether the complainant is entitled to have the contract rescinded on account of nonperformance by the railroad company of their part of it. The demand for rescission on this ground rests upon the peculiar law of the state of Louisiana before referred to. If the contract is to be governed by that law, I should have no hesitation in saying that the complainant is entitled to the relief which he asks. The building of the railroad beyond Brashear City, so as to give the complainant a through connection between his Opelousas road and Texas, was undoubtedly a material consideration with him, amongst the other considerations moving to the contract. The contract was a commutative one. In that respect it fully met the definition of the Louisiana code, which declares (art. 1768): "Commutative contracts are those in which what is done, given or promised by one party is considered as equivalent to, or a consideration for what is done, given or promised by the other."

It becomes material, therefore, to ascertain whether the contract is to be governed by the law of Louisiana. The general rule is, that a contract is to be governed as to its interpretation, its nature, its obligation, and its performance or dissolution, by the law of the place where it is made or entered into. In other words, *lex loci contractûs est lex contractûs*. The first and principal exception to this rule is, that if the contract is made in one state or sovereignty, and is to be performed in another state or sovereignty, it is to be governed by the law of the place of performance, because it will be presumed that the parties had the laws of the latter place in view when they entered into the contract. The rule and the exception have been fully discussed and commented upon by Mr. Justice STORY in his Conflict of Laws, and by many other writers on private international law, and it is unnecessary to review those discussions here.

In this case the contract was made in New York by persons who resided there. The railroad company, it is true, was a corporation originally chartered by Alabama, and subsequently capacitated by the laws of Louisiana and Texas to exercise all its faculties in those states; but its directors and officers mostly re-

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sided in New York and other northern states, and its principal office was in New York, and the meetings of its directors were usually held there. In this case, all the negotiations which led to the contract were carried on in New York, and the contract itself was concluded and executed there.

But, on the other hand, the interests, operations and property, which formed the principal object of the contract, were located in the southern states bordering on the Gulf of Mexico, to wit: Alabama, Mississippi, Louisiana and Texas, and largely in the state of Louisiana. The contract was made with reference to these interests, operations and property, but its direct object, that is, the things stipulated and agreed to be done and performed, were to be, or might be in part, done and performed in New York as well as in the states referred to. This will appear when we look at the contract a little more particularly.

It is altogether a personal contract, providing for the doing of certain acts on the one side, and on the other. Its object was a settlement of controversies, and a discontinuance of business opposition between the parties. It is evident that many of the acts stipulated to be done could be, and in fact were, done in the city of New York. There Morgan executed and delivered to the company the various deeds and transfers of property which he had agreed to do; the conveyances of the property in Mobile, the bills of sale of the steamers, the transfer of Pontchartrain Railroad Company stock, the conveyance of the railroad rights north and west of Brashear City. There he made his stipulated subscription to the securities of the railroad company. There the company delivered to him the said securities, namely, the bonds and certificates of stock. But the discontinuance of the steamboat business between Mobile and New Orleans and the delivery of the property consequent upon the said conveyances were done in Alabama and Louisiana; and the building and completion of the railroad beyond Brashear City were necessarily to be done in the latter state.

Now, by what law is such a contract to be governed, where it is executed in one state, and is partially to be performed in that state, and partially in other states?

I have no difficulty in saying that the conveyances and trans-

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fers to be made in pursuance of the contract were to be made in conformity with the laws of the states respectively in which the property, when consisting of realty, or subject to local law, was situated. And such conveyances and transfers, when executed, would be governed by the *lex rei sitæ*. But that does not answer the question as to what law the principal contract is to be governed by. In Louisiana, nonperformance of a material stipulation renders the whole contract liable to be dissolved. But no one would apply that rule of Louisiana law to a contract not subject to its dominion, even though the breach should occur in Louisiana. The fact, therefore, that one of the acts to be performed in this case—the construction of the railroad—was to be performed in Louisiana, will not help to resolve the question, unless we can affirm that the entire contract is to be governed by Louisiana law. Does the fact, that a portion of the contract must necessarily be performed in Louisiana, subject it to that condition? If that does, then the like fact that a portion of the contract is necessarily to be performed in Alabama would subject it to Alabama law, and make it an Alabama contract.

In this embarrassment, I do not know that I can do better than to fall back on the general rule that a contract is to be governed by the law of the place where it is made. The presumption, that where a contract is to be performed in a different jurisdiction, the parties must be intended to have in view the laws of the latter, seems to be repelled when the performance is to take place in several different jurisdictions. For when there are two equal and opposite presumptions, neither of them can prevail. The present case is still stronger; for much of the contract was performable, and actually performed in the place where it was made.

I do not mean to say that where the main and principal part of a contract is to be performed in a state different from that in which it is made, the presumption will not arise that it is made in reference to the laws of such place of performance, even though some minor and incidental parts are required to be performed in still different states. Such may, very possibly, be the result in many instances that may occur. When they happen they will be governed by the force of their own circumstances. But I do not see that I am called upon to apply any such ex-

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ceptional rule in this case. The building of the railroad in question was a very important consideration it is true; but the contract embraced many other considerations equally important, that were not necessarily to be performed in Louisiana.

The conclusion, therefore, to which I am forced to come is, that the principal contract, made on the 12th of December, 1871, between the complainant and the New Orleans, Mobile & Texas Railroad Company, was a New York contract, governed, as to its nature and obligation by the laws and jurisprudence of the state of New York; and as by these laws and jurisprudence, so far as appears, no such dissolving consequence follows from a nonperformance of part of the contract, as is claimed in this case, the claim is untenable, and the relief must be refused.

As no relief can be granted on either of the grounds laid in the bill of complaint, the same must be dismissed with costs.

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HENRY R. JACKSON vs. JOHN T. LUDELING et al.

Under the jurisprudence of Louisiana, a possessor in bad faith is entitled to compensation for improvements and betterments put upon the land by him which have been accepted by the owner, together with interest on the amount expended therefor, and is chargeable with the rents and profits with interest.

IN EQUITY.

Heard upon exceptions to the master's report.

A decree was made in the case by the supreme court of the United States, at its October term, 1874. The case is reported in 21 Wall., 616, and the decree of the supreme court is found on pages 634, 635. The decree reverses the decree of the United States circuit court for the district of Louisiana, by which the bill was dismissed, and reinstates the case, recognizes the mortgage executed by the railroad company to John Ray to secure its first mortgage bonds as a valid lien upon the property of the railroad company, and maintains the rights of the *bona fide* bondholders; it declares the title under which the defendant

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Ludeling and his associates claimed the property of the railroad company to be fraudulent and void, enjoins them from setting up any claim under their pretended title to the said property, or in any manner disposing of the same, and remits the cause to this court with instructions to direct an account to be taken of all the property of the railroad company, and to appoint a receiver thereof, and to order the property covered by the mortgage to be sold for the benefit, first, of all the *bona fide* bondholders secured by the mortgage, and secondly, for the benefit of other creditors of said company, and of its stockholders.

The fifth and last clause of the decree is in these words: "And it is further ordered and decreed that the defendants do account for all money and property received by them out of the property so sold to them or any of them, or from its profits or income, receiving in their account such credits as under the circumstances of the case by the law of Louisiana they are entitled to, and that they pay and deliver to the receiver whatever on such accounting may be found due from them."

Under this clause of the decree an order of reference was made to F. A. Woolfley Esq., as master commissioner, who on January 17, 1876, filed his report.

According to the report the gross earnings of the railroad, received by the defendants Ludeling and his associates, and the proceeds of the sale of lands the property of the railroad company, also received by the defendants, amounted to \$939,124.41, and the master finds that Ludeling and his associates were properly chargeable with that sum.

On the other hand the master reports that said Ludeling and his associates have produced an account showing that they have expended in construction and repairs for the purpose of putting the railroad in such condition that it could be operated, the sum of \$748,154.88, and for maintenance and running expenses the additional sum of \$777,647.72. These two last mentioned sums amount to \$1,525,802.60.

The master further reports that Ludeling and his associates exhibit an interest account upon the excess of their expenditures over their receipts made up at the rate of eight per cent. per annum, amounting to \$361,531.38. From this it appears that they

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claim a balance due them, over and above all receipts from the railroad property of \$948,209.57.

Although it does not appear by the master's report, the fact is that Ludeling and his associates claim the further sum of \$136,206.28 for interest paid by them on money borrowed to put the railroad in running condition.

The report says: "The excess of actual expenditures over actual receipts is \$586,677.99, disregarding the interest account. I have not examined these accounts and vouchers with a view to pass upon their absolute validity, or whether they are claims to be recognized for any other purpose than to answer the matter referred.

"The fifth paragraph of the decree directs the said defendants to show what money has come into their hands as income and profits, and to account for such part of it to the mortgagees as they are entitled to. The testimony shows sufficiently that the railroad was not in a condition to yield income or profit, without large expenditures, and that the expenses of management to earn income and profits were nearly equal to the receipts. The evidence shows satisfactorily that there was no income or profits from the road which equalled the necessary outlays for construction, management and maintenance, and I therefore think the complainants are not entitled to claim remuneration under that paragraph of the decree."

This suit was commenced in 1866, and most of the improvements upon the road, made by defendants, have been made since that date.

Exceptions were filed to the report by both the complainants and the defendants.

The main questions raised by these exceptions were the following:

1. It having been decided by the supreme court of the United States that Ludeling and his associates were possessors in bad faith, whether they, under the jurisprudence of Louisiana, are entitled to payment for the improvements and repairs by them placed upon the property, accounting at the same time for income and profits derived from the property.

2. Whether, having accounted for the income and profits of

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the property while in their hands, the defendants are entitled to interest on the money expended by them in improvements and repairs.

These questions, mainly the first, were argued by counsel of the parties both orally and by brief.

Messrs. J. A. Campbell and H. M. Spofford, for complainant:

I. Generally the doctrine of the courts of this country is, that neither at law nor in equity is the owner of a valid and legal title to lands to be subjected to a demand for ameliorations or improvements made without his consent by an occupant without title, and in bad faith. *Green v. Biddle*, 8 Wheat., 1; *Carver v. Jackson*, 4 Pet., 1; *Kenney v. Browne*, 3 Ridgw. P. C., 462-531; *Gillespie v. Moon*, 2 Johns. Ch., 602; Bump on Fraud. Con., 573; *Morris v. Terrill*, 5 Rand., 6; *Gunn v. Brantley*, 21 Ala., 633; Story's Eq. Jur., sec. 799 and note; Willard's Eq., 311.

II. The rule of cases decided in Louisiana is, that the *bona fide* possessor alone is the object of the protection of the courts in respect to the rents and profits, and the reclamation of the value of improvements. Civil Code, arts., 503, 508; *Gibson v. Hutchins*, 12 La. An., 545; *Boatner v. Ventris*, 2 La., 173 (8 N. S 657.); *Roberts v. Brown*, 15 La. An., 698; *Herriol v. Broussard*, 4 N. S., 627; *Thompson v. Kilcrease*, 14 La. An., 340, 342; *Roberts v. Brown*, 15 id., 698; *Williams v. Booker*, 12 Rob., 253; *French v. Bach*, 26 La. An., 731; *Beard v. Morancy*, 2 id., 347; *Anselm v. Brashear*, 2 id., 403; *Hallen v. Sapp*, 4 id., 519; *Jones v. Wheelis*, id., 541; *Brugere v. Slidell*, 27 id., 70; *Gaines v. New Orleans*, 1 Woods, 104; S. C., 15 Wall., 624.

See also Pothier du Droit de Propriété, No. 350, Denisart, 1, 3, p. 700, sec. 21; 38 Dalloz Jur. Gen., t. 38, p. 242, *et seq*, Nos. 428 and 444.

III. The defendants are not third possessors under art. 3407 of the Civil Code. 3 Troplong Priv. et Hy., No. 784; 25 Merten, tit. "Privèlège de Creance," sec. V, pov. 2.

IV. Under art. 508 of the Civil Code, the possessor is only entitled to the value of the materials which remain upon the land, together with the cost of the workmanship. *Cannon v. White*, 16 La. An., 85, 91.

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The result of the comparison of the several articles of the Code, and the decisions upon them by the supreme court of Louisiana, show that the possessor in bad faith, whose title and possession are fraudulent, and whose improvements were made after suit brought, is not entitled to claim for improvements against the injured owner.

Mr. John Ray, for the defendants, cited art. 12, code of 1808; art. 500, code of 1825, and 508 revised code of 1870. *Labrie v. Filhiol*, 4 Mart., 557; *Pearce v. Frantum*, 16 La., 414; *Louns v. Erwin*, 6 Rob., 192; *Killam v. Rippy*, 3 id., 138; *Wilson v. Benjamin*, 26 La. An., 587; *Williams v. Booker*, 12 Rob., 253; *Piron v. Bach*, 10 La. An., 13; *Heirs of Slidell v. Gonthier*, and *Heirs of Slidell v. Vanderstacken*. The last two cases not published. Op., Book 44, La. Sup. Ct., pp. 653, 654; *Stanbrough v. Wilson*, 18 La. An. 494.

Mr. W. H. Hunt on the same side:

I. It is a principle of the civil code that "No man should enrich himself at the expense of another." Civil Code, arts. 508, 2299, 2301, 2314, 3124, 3125, 3407.

II. The decisions of the supreme court of Louisiana with reference to the rights of possessors in bad faith, with few exceptions, have concurred in the enforcement of this principle. See cases cited by Mr. Ray; also, *Hill v. Bowden*, 3 La. An., 258; *Eastman v. Harris*, 4 id., 194; *Rhodes v. Hooper*, 6 id., 355; *Doles v. Cockrell*, 10 id., 541; *Haynes v. Harbour*, 14 id., 239; *D'Armand v. Pullin*, 13 id., 137.

Upon a review of all the decisions of the court upon this subject, it will appear that they uphold with a steadiness, only once and for a brief period shaken, the doctrines laid down in the code and derived from the civil law, that all possessors of property who have incurred useful and necessary expenses in its preservation and improvement are entitled to reimbursement.

III. The Spanish law on this subject is identical with that of Louisiana; 44th law, 28th title, 3d partidas.

IV. The law of France recognizes to the fullest extent the claims urged in behalf of defendants. Marcadé, vol. 2, p. 114; id., p. 412 V.; 2 Boil. p. 672, Com. sur art. 555, Code Nap.; Demolombe, Com. sur art. 555, Code Nap., vol. 9, p. 629, sec.

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679, and No. 695, p. 666 ; Merlin 1 Repertoire de Juris, *verbo* Amélioration; 5 Pothier (par Jupin), Bruss. ed., Nos. 344, 345; 5 Larombière Obl. 676, 677; 1 Fr. Mourlon, 698, No. 1463; *Robert v. Courtin & Dethan*, Sirey, 1840, p. 66 ; *Godard v. Valette*, Journal de Palais, I, 1844, p. 399.

V. The claims of complainants as mortgage creditors are subjected to the same equitable right of reimbursment to the third possessor. Rev. Civ. Code, art. 3370, which is identical with art. 2173, Code Nap.; 3 Troplong Privileges and Hypotheques, No. 835, 1836; Rev. Civ. Code, 3399; Code Prac., arts. 62, 68, 74; *Walker v. Dunbar*, 9 Mart., 682; *More v. Allain*, 10 La., 495; Rev. Civ. Code, art. 3408.

VI. But whether the right to reimbursement be measured according to the law that defines the rights of third possessors against mortgage creditors in a hypothecary action, or according to the law that defines the rights of third persons against the owners in a petitory, or any other action, is of little practical importance. The right of reimbursement is substantially the same under the law of Louisiana. Voet cited in 1 Trop. Priv. et Hyp., sec. 264.

Woods, Circuit Judge. There seems to have been on the part of counsel no attempt to reconcile the conflicting decisions of the supreme court of this state upon the questions at issue.

I am relieved from the task of attempting to reconcile these decisions. The question, what is the jurisprudence of this state upon the points in controversy, has been before this court and has been passed upon by it.

In the case of *Gaines v. New Orleans*, 1 Woods, 104, it was held by Mr. Circuit Justice BRADLEY, after a careful and laborious examination of the decisions of the supreme court of Louisiana, that under the laws of this state, possessors in bad faith are entitled to compensation for improvements which they have erected, if accepted by the owner. And in that case, the court confirmed the report of master Weller, which charged the city of New Orleans, which had been held to be a possessor in bad faith, with the value of the rents of the property in controversy, with interest on the rents from the date of their receipt, and credited

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the city with the expenditures made by it for repairs, both before and after suit brought, and with interest on the cost of the repairs, thus holding that when a possessor in bad faith had enjoyed the property, receiving its profits, and had made improvements and repairs, he must account for the reasonable rent with interest, but was entitled to have his expenditures refunded with interest. In his opinion, the circuit justice said: "I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the draining machine for the past thirty-five years, against the cost of constructions and repairs, and to charge the city with the rents of the buildings and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of \$125,266.79."

The decree of this court just referred to was taken to the supreme court of the United States by appeal, and the case is reported in 15 Wall., 624.

From the statement of the case as made by the reporter, I take this extract (p. 627): "The city, it was estimated, had received from increased taxation of other property during the term embraced by the order (including interest) \$208,825. Now this particular lot of land, it was testified, was originally worth \$200. The buildings erected by the city, independent of the machinery, cost \$18,000. The putting up of the machinery was finished July 1, 1835 or 1836 (some witnesses testifying to one year and some to another), and it was testified that a fair rental of the land and building was \$2,400 a year; the expense of repairs, \$500 per annum. The master accordingly charged the city on this basis:

Rental value from July 1, 1835, to November 1, 1870,	-	\$84,800 00
Interest on the rents at 5 per cent.,	- - - -	72,800 00
		<u>\$157,600 00</u>
And allowed the city expenses of repairs,	- - -	\$17,166 66
Interest on repairs,	- - - -	15,166 55
		<u>32,333 21</u>
And thus made the city chargeable with the difference,	-	<u>\$125,266 79 "</u>

Mr. Justice Hunt, in delivering the opinion of the supreme court, after quoting articles 500, 501, 3414 and 3415 of the civil code, proceeds to say: "The case of the present defendant is an

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instance where the works were done by one who was sentenced to make restitution, and who was expressly adjudged to possess *mala fide*.

"Mrs. Gaines therefore had the right to keep the improvements upon reimbursing their value and the price of the workmanship, or to compel the city to demolish and remove them.

"In the opinion of the judge upon the circuit, he uses this language: 'Whilst the profits and advantages of the draining machine are uncertain and indefinite in amount, there is no doubt of their reality, nor, if we place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged.'

"It is evident," says the supreme court, "from this statement that there has already been allowed to the city a sum not only equal to the value of the improvements if they were demolished, but of their actual cost. The city has therefore no cause of complaint, and the point under consideration must be held against it."

An examination of the report made in the case by master Weller, and which was confirmed by the supreme court of the United States, shows that the city of New Orleans, a possessor in bad faith, was allowed the amount expended in permanent improvements and interest thereon, and for necessary repairs and interest thereon, and was charged with the value of the rents, and interest on the same.

I shall follow in the case on trial, this decision of the supreme court of the United States so far as it is applicable.

The defendants claim interest at the rate of eight per cent. per annum. No reason is shown why interest should be computed at a higher rate than five per cent. per annum, the legal rate in Louisiana, when there is no contract fixing a different rate.

It appears from the report of Master Woolfley, that the gross receipts of Ludeling and his associates from the earnings of the road and the sale of lands, exceeded the amount expended by them for maintenance and repairs by the sum of \$161,476.69.

The complainants are entitled to be allowed this sum in their accounts with Ludeling and his associates, with interest to be calculated at five per cent. upon an average sum for an average

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length of time; and there should be allowed Ludeling and his associates their necessary expenses in improvements and betterments put upon and still remaining upon the road, with interest upon such expenses from the date when the expenditures were respectively made, at the rate of five per cent. per annum.

Without passing, therefore, in detail, upon the exceptions of the parties to the master's report, it will be recommitted to the master, with instructions to ascertain and report to the next term of this court the amount of the necessary expenses incurred by the defendants Ludeling and his associates, in the improvements and betterments put upon said railroad, and still remaining thereon, allowing interest at the rate of five per cent. per annum on such expenses, from the date they were incurred up to the date of filing the report; and he will report what sum ought to be added for interest to the said balance of \$161,476.69, the amount by which the gross receipts exceed the expenditures, for maintenance and running expenses.

EASTERN DISTRICT OF TEXAS.

GALVESTON, MAY TERM, 1872.

CALVIN C. CAMPBELL et al. vs. THE TEXAS & NEW ORLEANS
RAILROAD COMPANY et al.

1. A railroad company executed a first mortgage on its line of road to secure a large number of its bonds. The mortgage contained a clause declaring that whenever the company should procure from the state a loan of six thousand dollars per mile out of the school fund, to which it would be by law entitled on the performance of certain conditions, and which it was the declared intention of the company to obtain, and should execute to the state its bonds therefor, said bonds should constitute a lien upon the property mortgaged, superior to the lien of said first mortgage. Forty miles of the road remained to be completed, for which no loan from the state had been received. The legislature then passed an act authorizing the company to make a mortgage to secure bonds to the amount of \$6,000 per mile upon this uncompleted portion of its road, which should be prior to the said first mortgage, provided the company would relinquish all claims to the state loan for that portion of its road. This mortgage was executed accordingly, and the bonds secured thereby, sold. *Held:*

(a) That by relinquishing the right to the state loan, the company did not preclude itself, with the assent of the legislature, from putting the new mortgage upon the road, which should be superior to the original first mortgage.

(b) The act of the legislature authorizing this proceeding on the part of the railroad company did not invade any substantial and vested rights, and was therefore valid and binding.

2. The bonds to be given the state for the loan of the school fund were to run ten years, and a sinking fund was to be provided for their payment; the bonds which were authorized in their stead were to run fifteen years, and no sinking fund was required to be set apart for their payment. *Held*, that these circumstances were not of the essence of the contract, and that the legislation authorizing these changes did not impair the obligation of the contract contained in the original first mortgage.
3. The bonds to be given for the state loan were to bear six per cent. interest; the bonds authorized in their stead, bore eight per cent. interest. *Held*, that the addition of two per cent. to the interest of the substituted bonds

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was to that extent an invasion of the rights of the holders of bonds under the original first mortgage, who had the right to claim that bonds at the rate of \$6,000 per mile only, and bearing only six per cent. interest, should be made superior to theirs.

4. A party holding a first incumbrance on property about to be brought to sale, ought not to be deprived of the right of bidding on the property up to the amount of his claim. Therefore, when his right of priority is in dispute, it ought to be settled before the sale; and whenever a specific property, on which a separate incumbrance exists, can be sold separately without injury to or sacrifice of that or other property, it should be thus sold so as to give every incumbrancer the chance of protecting his securities without involving himself in onerous engagements.
5. A trust deed, executed by a railroad company to secure its bonds, purported to convey a large number of sections of public lands, being a portion of what the company would be entitled to on the completion of its road; the certificates for which were receivable from time to time as portions of the road were completed: *Held*, that purchasers in good faith from the railroad company of a part of the certificates, without notice that they were covered by said deed of trust, acquired a good title free from the incumbrance of the trust deed.

IN EQUITY.

This cause was heard for final decree on the pleadings and evidence. It had been before one of the judges of the court (Mr. Circuit Justice BRADLEY) on a former occasion upon a motion to dissolve an injunction which had been allowed in the case; which motion involved the merits of the bill. The opinion of the circuit justice upon that motion contains a full statement of the facts, and will be found in 1 Woods, 368, to which the learned reader is referred.

Messrs. Geo. W. Paschal and John Sessions, for complainants.

Messrs. Wm. M. Everts and Wm. P. Ballinger, for defendants.

BRADLEY, Circuit Justice. Without rehearsing the facts of this case, which was done in a previous opinion, I will proceed to state the conclusions to which I have come.

1. On the main point involved in the case, the claim of priority on behalf of the bonds issued in 1861, my opinion is that the said bonds and the mortgage given to secure the same are entitled to priority over the bonds of 1858, commonly called the

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land grant bonds, upon the property covered thereby, namely: the railroad, road bed, turnouts and depots, between Houston and Trinity river, together with the locomotive engines and rolling stock, etc., appertaining thereto.

It seems clear from the evidence, that at the commencement of the year 1861, that portion of the road, at least, remained still unfinished, and that the resources of the company were exhausted; that the school fund loan for this portion of the line, on which the company had relied, was essential to enable it to complete the work; and that the state could not or did not desire to advance any more school fund bonds. In this situation of affairs, on the 7th day of February, 1861, the act was passed, entitled "An act for the relief of the Texas & New Orleans Railroad Company," by the first section of which it was enacted, that the company should have until the 1st of January, 1863, to locate its land certificates, and return the field notes of the same to the general land office; and by the second section, that the company should have the power, and was thereby authorized, to issue a first mortgage upon its railroad from the west bank of Trinity river to the city of Houston: provided, that the company should relinquish all claims to the state loan on that section of its road. Now, the mortgage of 1858 had in it a special reservation, that whenever the company should procure from the state the loan referred to, being \$6,000 per mile to be loaned from the school fund (which it declared its intention to obtain), and should execute its bonds to the state for the repayment thereof, they should constitute a lien upon the property mortgaged prior and superior to the said mortgage of 1858. This reservation was made in pursuance of the law of 1856, which entitled the company to this school fund loan, and by which it was expressly provided, that the bonds given to the state therefor should constitute a lien upon the road and charter rights of the company, including the road bed, right of way, grading, etc., and all property owned by the company as necessary for its business; and that they should have a priority over all other claims against said company. Pasch. Dig., arts. 3501-3505.

Now, what relief could it have been to the company to destroy

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this right to raise money by putting a first lien of \$6,000 per mile on their road? The holders of the bonds of 1858 contend, that although the company might have given such a lien to the state upon borrowing money of it, yet that it relinquished this right, and by relinquishing it, made their bonds and mortgage the first lien on the road and its appurtenances.

This certainly could never have been the intention of the parties, for it would have been, on the part of the company, a piece of the greatest fatuity thus to surrender this most valuable resource for raising the means which were necessary to enable it to complete its road and works. And to my mind, it is proved quite conclusively, as far as parol proof and the contemporary acts of the company and all dealing with it at that time, can go to prove a matter of this kind, that the act of February 7, 1861, was regarded and intended as a permission and authority, given by the state to the company, to substitute some other lender in its place, and to subrogate its right of priority to such substituted creditor. The question is, Could this be done?

There seems to be no doubt, that the state might have advanced the loan, received the company's bonds, and assigned such bonds to any other party, and might thus have substituted another party in its stead. The state might have proposed to A. thus: "Advance this loan to the Texas & New Orleans Railroad Company for us, and you shall have the company's bonds to be received therefor." No reasonable objection to such a transaction could have been made by prior mortgagees or bondholders. If either of these things could be done, why could not the state, in the exercise of its legislative power, have substituted another party in its place as lender, and authorized a subrogation of all its rights of priority to such lender? No substantial rights of any other persons or parties would have been thereby invaded. And acts of state legislation are to be sustained, if they do not invade any substantial and vested rights. If the legislature of the state, by the act of 1861, did this, I can see no objection to the validity of the transaction.

The company, upon the footing of this law, formally relinquished its claims to the state loan as required, and provided for the issue of 480 bonds of \$500 each (being just \$6,000 per

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mile for the forty miles of railroad yet to be constructed), and amounting in all to \$240,000, payable in fifteen years, with interest at eight per cent. per annum, and to secure the same, executed to Benj. A. Shepherd and William J. Hutchins, as trustees, a mortgage on the said forty miles of road, its turn-outs, depots, etc., and the locomotive engines and rolling stock, etc., appertaining thereto. These bonds and the mortgage were dated the first of January and issued the 18th of March, 1861. The bonds expressly stated, that this issue of bonds and the mortgage was made in lieu of the issue of the same amount on the said section of railroad which the company was authorized to issue and deliver to the state under the act of August 13, 1856; and the mortgage, in like manner, refers to the act of 1861, and formally relinquishes all claims to the state loan, and professes to be a first mortgage on this part of the road by virtue of that act.

The bonds thus executed were issued to various parties, contractors and others, and the proof is sufficiently conclusive that they were received for value to the amount of their face, and were negotiated and received as a first lien on that portion of the railroad.

In my judgment, these parties are entitled to stand in the place and stead of the state, and have a first lien on the line in question, according to the terms of the act of 1856, and the reservation contained in the mortgage of 1858.

I believe it to have been the intent of the parties, the intent of the legislature, and the understanding of the holders of the bonds of 1858 themselves, as evinced by their declarations and conduct.

2. But it is objected by the defendants, that the bonds which were given vary from those which were to be given to the state; and hence they cannot, even by legislative aid, be substituted therefor without impairing the obligation of the contract between the company and the bondholders of 1858, as, first, they run for a longer time—fifteen years, instead of ten years. I do not regard this as belonging to the essence of the contract. The term of ten years is mentioned in the act of 1856 as the time for the bonds to run, it is true, this period being directory to the state officers, as to the time they were to allow the bonds to run. But

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there was no specific mention of the time of credit in the reservation made in the mortgage of 1858; and the substantial circumstance as between the company and the holders of the bonds of 1858 was, that the former had a right to lay a loan of \$6,000 per mile on their road, to have priority of the mortgage securing the bonds of the latter.

Another variance relied on is the fact that the bonds and mortgage of 1861 do not require a sinking fund to be reserved, as was to be done with the bonds to be given to the state. This, again, does not belong to the substance of the right as between these parties. It was one of the terms in detail which the officers of the state were to require of the company. It was a mode of payment, or rather a mode of providing for payment, which came to the same thing in the end, as payment of the entire amount at the day of maturity. If that sinking fund were annually put up, just so much would be abstracted from the funds of the company which might otherwise have gone into improvements, making the property of the company so much more valuable. It would make the company neither richer nor poorer. If the substitution could be made at all, the legislative power to authorize it to be done could not be made to depend on a strict and literal compliance with all the terms which the state officers were required to observe in taking the company's bonds. Had the arrangement with the state itself been carried out, surely, the legislature could have authorized the school fund board to receive bonds at fifteen years, instead of ten years, without losing the state's priority of lien. The great, controlling, substantial stipulation between the company and the bondholders of 1858 was this: "We expect to make a loan from the state of \$6,000 per mile on our road, at six per cent. interest; that loan must be a first lien." All the rest is matter of detail between the state and the company, of no essential concern to the bondholders. This strikes me as the sound and sensible view of the subject.

A third variance complained of is the promise to pay eight per cent., instead of six per cent., on the bonds of 1861, six per cent. being the amount to be paid to the state. I regard the additional two per cent. per annum as an additional burden imposed on the road, beyond what was stipulated for.

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The company had no right to interpose ahead of the bonds of 1858, anything more than \$6,000 per mile, drawing six per cent. interest. As this is matter of amount merely, it ought to affect the holders of the bonds of 1861 only *pro tanto*. If the bonds issued and outstanding are the full quota of \$6,000 per mile, only six per cent. can be allowed thereon. This is the limit of incumbrance which should be placed in priority to the bonds of 1858. If less than \$6,000 per mile have been issued, then such abatement must be made of the eight per cent. interest, if any abatement is necessary, as will bring the amount to \$6,000 per mile and six per cent. interest.

3. But the defendants insist that the original decree is substantially correct, in any event, and ought not to be modified, inasmuch as "the relative priority of the two series of bonds" is left open for future decision, after the sale shall be made. It seems to me, however, to be very material to a party holding a first incumbrance on property, not to be deprived of the right of bidding that property up to the amount of his claim. This he cannot do when the property is sold together with other property, or when his right to priority is left in dispute. Cases often occur when a sale of the property out and out, and a subsequent adjustment of claims upon the fund, is the only just method which can be pursued. But whenever a specific property on which a separate incumbrance exists can be sold separately, without injury or sacrifice of that or other property, it ought to be thus sold, so as to secure to every incumbrancer, if practicable, the right of protecting his security without involving himself in onerous engagements, or being subjected to onerous conditions. And if a decree is made in plain disregard of this rule, I think it ought to be corrected.

A decree in this case will, therefore, be made for correcting the decree complained of, by which it shall be declared that the said bonds and mortgage of 1861 are entitled to priority over the bonds of 1868, and by which the forty miles of road and its appurtenances, between the Trinity river and the city of Houston, as embraced in the mortgage of 1861, shall be sold separately for the purpose of paying, first, the proportionate amount due to the receiver for expenses on the said road yet unpaid, and also a proportionate

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amount of the costs and expenses of suit; and secondly, the amount of principal and interest due on the bonds of 1861, not to exceed what the full amount of \$6,000 per mile would amount to at six per cent. per annum.

Another matter of complaint made against the decree in the former suit is, that it directs the special master to sell "all the land warrants or scrip received by said company from the state of Texas;" whereas, only 1320 sections of said land were included in the two trust deeds of 1858, and none of them were included in the mortgage of that date. And on the other hand, the complainant Campbell alleges that he is the holder of one hundred and eighty land certificates of 640 acres each, amounting to 115,200 acres in all, which he holds as surviving partner of Morris, Campbell & Co., who were the contractors for building said road, and received from the company in all four hundred and seventy-two certificates, or 302,080 acres of such land scrip; and received the same in good faith, without any knowledge of their being mortgaged or pledged in any manner, and have parted with all except those now held, to other persons, purchasers thereof in like good faith; and he claims to be protected in the possession and enjoyment of these certificates, and that the other parties to whom certificates were sold by Morris, Campbell & Co, may also be protected.

The counsel for the holders of the bonds of 1858, on the other hand, contend that the trust deeds which cover these land grants to the extent of 1320 sections (then not in existence, it is true) became a lien on the first 1320 sections which were subsequently issued by the company, as soon as they were issued; and if there is any difficulty in finding the balance, the contractors must meet it; hence they demand that the contractors shall surrender all the certificates held by them, or at all events, that they shall be subject to sale under the decree, until the number of 1320 sections has been made good to the use of the trust deeds of 1858.

It is admitted on both sides that when the trust deeds were given, these land grants were not yet earned by the company; that they existed only in contemplation of law, and depended for actual existence upon compliance by the company with the conditions which, by the laws of Texas, would entitle it to certifi-

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cates therefor; that when the certificates did issue, until actually located, they were mere personal property, and like any negotiable security, transferable from hand to hand. It also appears that the amount to which the company would be entitled, when the conditions were complied with, was sixteen sections per mile of their road; that they included in the two trust deeds only twelve sections per mile (which amounted to the 1320 sections), and reserved four sections per mile (which was 440 sections in all) to be employed by them in constructing their road, in common with the proceeds which they might derive from the sale of their bonds. This arrangement seems apparent from the evidence and all the acts of the company taken together, and it is unnecessary for me to refer to particular parts of it. It is the conclusion to which I have come from the facts and evidence in the case.

Then how do the respective claimants stand in relation to each other? The bondholders, as against the company, under the deeds of trust, have a claim to certificates for 1320 sections of land; not by absolute grant or assignment, but by the effect of the trust deeds operating by way of estoppel. The trust deeds could not operate as grants of these certificates, for the certificates were not in existence when the deeds were executed. They only operate by way of estoppel. They amount to covenants on the part of the company that the certificates shall be included in the trust deeds when they come into existence. This is the doctrine of equity. To this the courts hold the company, and as against it and its assigns, having notice of the contract, they treat the certificates as if they had been in existence, and had been embraced in the trust deeds when they were executed. But the courts will not override other equities in coming to this result. If parties purchased the certificates in good faith, and without notice of any such estoppel, it would be doing injustice to them to deprive them of the certificates so purchased.

In the case before us, there was a margin of four sections per mile, over and above the amount or number of sections pledged to the bondholders, which the company itself had a perfect right to dispose of. It would be naturally supposed by parties dealing with the company, even if they knew of the existence of the

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trust deeds, that so long as the company kept within the line of this margin in issuing additional certificates, no interference was made with those to which the trustees under the trust deeds were entitled. If a man sell me fifty bushels from a lot of one hundred bushels of corn, and a third person afterwards, with knowledge of the sale to me, purchase the remainder, and remove his part of the lot, leaving my quantity undisturbed, how can he be liable to me, even though the seller should afterwards fraudulently dispose of my part to other parties?

From the evidence in the case, and all the facts and circumstances bearing upon this part of it, without attempting to go into unnecessary details, I am brought to the conclusion that the contractors received their certificates in good faith, and are entitled to be protected in the possession and enjoyment thereof; and the decree should be modified accordingly.

GALVESTON, DECEMBER TERM, 1874.

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1. Parties entered into a contract with the city council of Galveston, whereby they agreed to fill, grade, tamp, roll, and curb certain specified sidewalks, and to lay down and fabricate thereon an asphalt pavement, and to obtain the written consent of the owners of lots abutting on said pavements, to the laying of said asphalt pavement. Without obtaining such consent, the contractors proceeded to fill, grade, etc., the sidewalks, but before completing the work preparatory to the laying of the pavement, they were forbidden by the city authorities from going on with the work, and the contract was repudiated by the city. In a suit brought by the contractors to recover for the work actually done, and also damages for the breach of the contract by the city, *held*, that the contract was entire; that the obtaining of the consent of the property holders to the pavement named was a condition precedent, to be performed before any work was done, and there could be no recovery in the action unless it was averred and shown that such consent had been obtained.
2. A municipal corporation has not inherent power to issue negotiable coupon bonds which shall circulate as commercial paper, and be unimpeachable in the hands of a *bona fide* holder.
3. A city was authorized by its charter to exact the cost of sidewalk improve-

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ments from the owners of abutting lots to be collected by assessments on the property; to raise money for general and special purposes by taxation; and to issue bonds for a single purpose which was not sidewalk improvements: *Held*, that these provisions of the charter excluded the power to issue negotiable coupon bonds to pay for sidewalk improvements.

This cause was tried on the defendant's demurrer to plaintiffs' petition. Under the system of pleading which prevails in Texas, much of the evidence on which plaintiffs relied to sustain their cause was set out in the petition.

The case as made by plaintiff's petition was substantially as follows: On February 28, 1874, the plaintiffs, as partners, entered into a contract in writing with the city of Galveston, by which they agreed, for a compensation therein named, to fill, grade, tamp, roll, curb and pave certain sidewalks in the city of Galveston. This contract was made in behalf of the city by the mayor and the chairman of the committee of the common council on streets and alleys, by virtue and in pursuance of certain ordinances of the city council.

The plaintiffs, the petition averred, immediately after the execution of the contract, entered upon the performance of the work, and continued it, at great labor and expense, for forty days, when they were compelled by force and the power and authority of the defendant, to desist from and abandon the work, and, although always ready and anxious to perform the said contract and complete said work, have ever since been wrongfully and willfully forbidden and prevented by the defendant from so doing.

The work done by the plaintiffs at the contract price was worth \$18,194, and the profits on the unfinished portion of the work, not including the paving, would have been \$127,990.57. For the aggregate of these two sums, to wit, \$146,184.57, and for \$50,000 general damage, the plaintiffs asked judgment.

The petition set out as exhibits, and as a part of itself, the contract in full and the several ordinances of the city council, by authority of which it was claimed the contract was made.

It was also averred, in an amended petition, that after its execution by the mayor and chairman of the streets and alleys committee, the contract was approved and ratified by the action of the city council.

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It appeared from the exhibits to the petition that, by the contract upon which the suit was brought, the city of Galveston bound itself to pay to the plaintiffs, under the name of D. G. Hitchcock & Co., in the bonds of the city of Galveston, styled "Galveston City Bonds for Sidewalk Improvements," to be taken at par, a named rate for every square yard of pavement laid down by the plaintiffs upon certain sidewalks designated in the contract; said pavement to be composed of asphalt in bulk, rolled solid to the thickness of three inches: "provided, however, that the said D. G. Hitchcock & Co. obtain the written consent of the owners of the property fronting or abutting on said sidewalks to the laying down of the said pavement, which written consent or selection of the said pavement shall be filed in the mayor's office with the city clerk."

The contract further bound the city to pay to the plaintiffs in the same bonds to be taken at par, a specified price for the filling necessary to be done, preparatory to the laying of the pavement, under which term of "filling" were included grading, tamping and rolling; also, a specified price for the wooden curbing that might be needed or used in filling up and grading the said sidewalks preparatory to the putting down of the pavement.

The contract, after thus specifying the work to be done and the prices to be paid therefor, proceeded as follows:

"In consideration of all the foregoing, the said D. G. Hitchcock & Co. bind themselves to lay down and fabricate the said pavement in the manner and style above set forth and stipulated; and they also bind themselves to fill, grade, tamp, roll and curb the said sidewalks as above set forth and stipulated, and to receive in payment for all said work the respective prices above stated, and in the bonds of the city of Galveston, styled 'Galveston City Bonds for Sidewalk Improvements,' at par."

The charter of the city of Galveston is a public act of the legislature of Texas. In sec. 8 of art. 3 of title IV, it is provided that the city council shall have power "to establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and crossings. * * * The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk, and the cost of any sidewalk

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constructed by the city shall be collected, if necessary, by the sale of the lot or part of lot or block on which it fronts, together with the cost of collection, in such manner as the city council may, by ordinance, provide, * * and the balance of the proceeds of sale, after paying the amount due the city and costs of sale, shall be paid by the city to the owner."

Sec. 2 of the same article and title declares that the city council shall not borrow, for general purposes, more than \$50,000.

Sec. 3. That the city council shall have power "to appropriate money and provide for the payment of the debts and expenses of the city."

Sec. 4. That the city council shall have power "to provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created."

The ordinances set out in the petition as authority, by virtue of which the contract sued on was made, were two ordinances, approved August 19, 1873; an ordinance approved October 21, 1873, and an ordinance approved February 3, 1874.

The first ordinance, approved August 19, 1873, authorized and directed the mayor and chairman of the committee on streets and alleys "to make a contract or contracts with proper and responsible parties, to fill up, grade and pave the sidewalks on both sides of the hereinafter named streets, and to curb the same; and for this purpose they were directed to advertise for the period of thirty days for bids or proposals to fill up, grade, pave and curb, in part or in whole, the sidewalks herein named." The ordinance then proceeded to specify the sidewalks to be thus improved.

Sec. 2 of this ordinance, as amended by sec. 1 of the ordinance of October 21, 1873, provided that "said sidewalks shall be paved with either of the following materials: Asphalt, hard bricks, laid in a bed of Portland cement and properly grouted; concrete, made of Portland cement, mixed with other proper materials; or with tiles or stone, laid in a bed of Portland cement; and the curbing around the same shall be made of the best hard bricks, and capped with a plank of heart pine, three inches in thickness

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and twelve inches wide, properly fastened to the curbing with the necessary iron bolts."

Sec. 5 of the same ordinance provided that "the cost of filling, raising, curbing and paving each separate sidewalk, as soon as the same shall be finished and completed, shall be a charge against the property abutting and fronting thereon, and shall be assessed against the same in the following manner." The section then declared how the cost of the work should be assessed against the property, and that it should be a lien thereon until paid.

Sec. 6 provided that the assessment should be paid in five annual installments, with interest.

On the same day on which this ordinance was approved, another was approved, which authorized the mayor to have printed or engraved coupon bonds of the city of Galveston to the amount of \$250,000, to be styled "Galveston City Bonds for Sidewalk Improvements;" to draw interest at ten per cent., and to be payable to the bearer in fifteen years, provided that the city council should have the right to redeem at par any or all of said bonds at any time after five years from their sale or disposition.

This ordinance also provided that the assessments made on property for the construction of sidewalks should, as they were collected, be appropriated to the payment of the interest on said bonds, and form a sinking fund to pay the principal at their maturity or when redeemed.

The ordinance of the 3d of February, 1874, provided that sidewalks on both sides of certain other streets therein named should be filled up, graded, curbed and paved; and it then proceeded to direct that "the sidewalks shall be filled up to the grade established by the civil engineer, and curbed with cypress wood, stone or brick, and a pavement six feet in width, laid in the center of the same—the said pavement to be composed of either asphalt, hard brick laid in Portland cement, or other proper materials, tiles or stone."

This ordinance authorized the mayor and chairman of the streets and alleys committee "to make a contract or contracts with proper and responsible parties to fill up, grade, curb and pave the said sidewalks," and directed that the cost of the work

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should be assessed against the owners of the lots, in the same way as prescribed in the ordinance of August 19, 1873.

All these facts appeared either from the petition of plaintiffs or from the charter of the city of Galveston, of which, being a public act, the court took judicial notice.

Mr. F. Charles Hume, for plaintiffs.

Messrs. Wm. P. Ballinger and Geo. Flournoy, for defendant.

Woods, Circuit Judge. The defendant alleges numerous grounds of demurrer, many of which I do not think well taken. As in my opinion, some of the grounds of demurrer are well taken, it is not necessary to notice particularly those which are overruled.

The first ground of demurrer is the general one, that the facts stated in the petition are not sufficient in law for the plaintiffs to have and maintain their action against the defendant.

I pass over the question whether the city council could delegate the authority to the mayor and chairman of the streets and alleys committee to make the contract in question. Let it be conceded that the power of these two officers was as full as the power of the city council itself to make the contract. The question meets us at the threshold of the plaintiffs' case, Have they made the necessary averments to entitle them to a recovery, conceding that the contract was a valid one and binding on the city of Galveston?

The ordinances by virtue of which the mayor and chairman of the committee acted are to be considered in giving construction to the contract. These officers act as the agents of the city, and the contract recites that it is made in accordance with the authority vested in them by the city council. It is to be presumed that the agents of the city made the contract in pursuance of the powers conferred upon them, and the plaintiffs, being bound to know the extent of the authority of the agents with whom they were contracting, made such a contract with them as they were authorized to make. Story on Agency, sec. 73.

Both the ordinances which empower the mayor and chairman of the committee to contract require them to enter into contracts

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with responsible parties to "to fill up, grade, curb and pave the sidewalks designated." It is clear to my mind that this is authority to contract for filling, grading, curbing and paving, and not for filling and grading without curbing or paving. It was not necessary for the mayor and chairman to contract with the same party to do all the work. But they were required to contract to have all this work done by somebody. The mayor and chairman so construed their authority, and entered into the contract with the plaintiffs, by which the plaintiffs bound themselves to "lay down and fabricate the said pavement in the manner and style above set forth and stipulated;" and also "to fill, grade, tamp, roll and curb the said sidewalks, as above set forth."

The authority given to the city by its charter was to construct "sidewalks," the ordinances contemplated the construction of sidewalks, and the chief end and purpose of the contract was the construction of sidewalks. The filling, grading and curbing were only the preparatory steps necessary to the completion of a sidewalk by the putting down of the pavement.

The main purpose and the ultimate object were the pavements. No sane man supposes for a moment that the city council desired to raise a bank of sand in front of the lots of the citizens and leave it so, or that such was the purpose of the ordinance or the contract. If the city council had not decided to complete the sidewalks by paving them, they would not have entered upon the work at all.

So the contract was intended to provide for paving as well as filling, grading and curbing, and did provide for it. It is clearly not the purpose of the contract that a part of the work should be done and not the residue. The plaintiffs agree to do the whole. The performance of a part only without the consent of the city council is no performance and does not entitle the plaintiffs to a recovery. If there is a condition precedent to the performance of a part of the contract and the contract is an entirety, that condition precedent must be performed, or the whole contract fails.

Now, what does the contract provide? The plaintiffs agree to fill, grade and curb and to pave with asphalt. There is no covenant to pave with anything else. But the contract says, in effect, you shall not pave with asphalt unless you obtain the written

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consent of the owners of the property abutting on the sidewalks to the laying down of an asphalt pavement, which written consent or selection shall be filed in the mayor's office with the city clerk.

It seems to me that the obtaining of that consent is a condition precedent to be performed before any part of the contract is binding on the city. The plaintiffs agree to fill, grade, tamp, curb, etc., preparatory to the laying down of an asphalt pavement, and then to lay the asphalt pavement, if the owners of the property will consent. It is not to be supposed that if they were prevented from completing a sidewalk by the refusal of the property holders to consent to an asphalt pavement, the contract authorized them to do the work simply preparatory to the laying of a pavement and then leave it in that unfinished condition. How do we know but that the inducement to pay the price specified for grading, etc., was in the fact that the plaintiffs had agreed to lay the asphalt pavement for the specified price? The city of Galveston has agreed by this contract to pay \$1.25 per cubic yard for the filling, grading, tamping and rolling of a sidewalk, preparatory to the laying thereon of an asphalt pavement, and then to pay the price of \$1.75 per square yard for the laying of such pavement. It has never agreed to pay the sum named for the work necessary to be done preparatory to the laying of any other than an asphalt pavement.

This contract must be taken as a whole. The presumption is that the price of one part of the work depends upon the price agreed upon for another part. The price allowed by the contract for filling and grading and curbing may have afforded the plaintiffs a profit, while the price for paving would have afforded none, or even entailed a loss. That this is not mere conjecture is shown by the fact that the petition claims damages for the profit lost in the grading, etc., ranging from one to two hundred per cent., while it claims no loss of profit on the paving. Can the plaintiffs be allowed to pick out the profitable parts of the contract for performance and abandon the unprofitable? They have agreed to do the whole. They cannot do the whole according to the contract, they cannot be in a position to perform in full unless they have the consent of the property holders

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in writing to the laying down of the particular pavement mentioned in the contract, and that consent is filed in the office of the mayor. They must perform the whole contract, and they cannot, according to the terms of the contract, perform it without compliance with the conditions precedent. In other words, no part of the contract is binding on the city unless the other party to the contract has first obtained the consent of the property holders to the laying down of the pavement selected.

There is no averment in the petition that such consent has been obtained, and without such consent the petition is fatally defective. *Jennings v. Moss*, 4 Tex., 452; *Frazier v. Todd*, id., 461.

The demurrer must, therefore, be sustained, on the ground that the petition does not set out facts sufficient to entitle the plaintiffs to recover.

2. It is objected that the city council had no power, either through an agent or by its own ordinance, to make the contract sued on in this case.

The contract contemplates the issue by the city of Galveston of bonds to the amount of \$250,000, with ten per cent. interest, due in fifteen years., or redeemable, if the city so elect, after five years, to pay for work to be done under the contract. The contract cannot be performed without the issue of the bonds provided for in the ordinance of August 19, 1873.

It is denied that the city of Galveston has power, either express or implied, to issue the bonds for the purposes named in the contract, and I think the demurrer to the petition fairly presents the question.

I am unable to find any authority in the city charter, either express or clearly implied, to issue bonds or borrow money for the purpose of constructing sidewalks.

To pay out bonds is in effect a selling of them, or a borrowing of money on them. *Rogers v. Burlington*, 3 Wall., 666; *Midleton v. Allegheny Co.*, 37 Penn. St., 237; *Seybert v. Pittsburg*, 1 Wall., 272.

The clauses from the city charter already cited, and which are referred to by plaintiffs' counsel as containing the authority, do not confer any express authority to borrow money for other than

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general purposes, nor is the authority clearly implied. The power expressly given to appropriate money and to provide for the payment of debts and expenses of the city, to provide special funds for special purposes, to construct sidewalks, and to assess the cost of their construction upon the owners of the abutting lots, are powers usually found in city charters; but no fair intendment can be drawn from this of a power to issue bonds and borrow money upon them for special purposes. The reasonable construction therefore is, that money to pay debts and expenses, and to provide special funds, is to be raised by the means for raising money expressly given by the charter, namely: by taxation or special assessment, and not by the issue of bonds, which is only authorized for one specific purpose. As these means are prescribed, any other means not expressly given seem to be excluded.

The power to borrow money and issue bonds, not being expressly given by the charter, and not being clearly implied from any of its provisions, the question is presented whether the city of Galveston or any other municipal corporation has this power without legislative authority expressly given or clearly implied.

It appears from the ordinance approved August 19, 1874, authorizing the issue of the bonds in question, and which is an exhibit to the petition, that the bonds were to be coupon bonds, payable to bearer at a future day. Both the bonds and coupons, therefore, would have all the qualities of commercial paper. *Mercer Co. v. Hackett*, 1 Wall., 83; *Meyer v. Muscatine*, 1 Wall., 384; *Gelpcke v. Dubuque*, 1 Wall., 175; *Moran v. Miami Co.*, 2 Black, 722.

The charter expressly declares in title V, which is exclusively devoted to taxation, that the city council shall have power within the city, by ordinance, to annually levy and collect taxes, not exceeding one per cent. on the assessed value of all real and personal estate and property in the city, and provides for various other methods of taxation; and title VI prescribes the method to be pursued for the collection of taxes.

There is authority given by the charter to issue bonds; but that is for one special purpose, and that purpose is not the construction of sidewalks. See title IX, art. 1, sec. 1, where the

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authority to issue bonds is restricted to a single object, and carefully limited and restrained.

The question is therefore fairly presented, whether the city of Galveston was invested with implied power to borrow money for the construction of sidewalks, and issue therefor its negotiable bonds and coupons, payable to bearer at a future day.

Dillon, in his work on Municipal Corporations, sec. 407, says:

“Banking and trading corporations have implied or incidental power to make negotiable paper, and the same rule has in some cases been applied to municipal corporations. The ordinary warrants of such corporations, it is clear, do not cut off equities, and it is at least doubtful how far they have the implied power to make paper which shall have this effect. The adjudged cases on this point are conflicting.”

The learned author (sec. 406) says: “In the author’s judgment, the better opinion is, that there is no implied power in the officers of a town, county or city corporation to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not necessary as an incident to those ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse, and fraught with danger.”

These views are sustained by recent decisions of the supreme court of the United States.

In the case of *The Police Jury v. Britton*, 15 Wall., 570, the court says: “We have therefore the question directly presented in this case, whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness.”

In answering this question the court says: “The power to issue such obligations, and thus irretrievably to entail upon counties, parishes and townships a burden for which they have received no just compensation, opens the door to immense frauds

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on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which was always to be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to incur obligations for work actually done in behalf of the county and parish and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that trustees or other local representatives of townships, counties and parishes have the implied power to issue coupon bonds payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated." And so the court held that the officers of a parish, county or other local jurisdiction invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt.

The only difference between the case just cited and the one under consideration is, that the former was the case of a parish in Louisiana and the latter the case of a city in Texas. The questions raised and decided in the case of *The Police Jury v. Britton, supra*, are identical in all respects with those presented in this.

I shall follow this authority until overruled, because it is the judgment of the court of last resort, and also because I heartily approve it.

In a more recent case (*The Mayor v. Ray*, 19 Wall., 468), the same court held that neither the power to borrow money nor to issue commercial paper therefor belongs to a municipal corporation as an incident of its creation. To be possessed, it must be conferred by legislation, either express or implied. The case is decided, it is true, by a divided court, but there is no dissent

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from the proposition decided in the case of *The Police Jury v. Britton*, *supra*.

The point of difference between the judges seems to have been whether certificates of debt, city warrants, orders, checks, drafts, and the like, used for giving to public creditors evidence of the amount of their claims are or are not commercial paper, so that the holder takes them free from legal and equitable defenses, and with an absolute obligation on the part of the municipal corporation to pay them. But as I read the case, there does not appear to be any dissent from the general proposition, unless it be by Mr. Justice HUNT, that a municipal corporation, with power of taxation, given it for the purpose of raising means to carry on its functions, cannot raise money by issuing or selling its coupon bonds, due at a future day and payable to bearer, without legislative authority, expressly given or clearly implied.

These two decisions by the supreme court of the United States are a law to this court which it follows with willing steps. A construction of the charters of municipal corporations which, without the express permission of the legislative power, gives their officers the power to issue bonds, having all the qualities of commercial paper, without limit as to amount or time of payment, affords an opportunity for the most stupendous frauds, and presents a temptation to their perpetration to a class of officials who, as the history of the country shows, are frequently rapacious and unscrupulous. One of the great evils of these times is the increase in the amount of the indebtedness of counties, towns and cities. The facilities which have been supposed to exist for the borrowing of money and the issuing of bonds by these local jurisdictions have fostered extravagance, fraud and speculation, and loaded the people with burdens grievous to be borne. The result has been that the prosperity of cities has been destroyed, and the property of the inhabitants subjected to a public mortgage, in many cases equal in amount to the value of the property itself.

The assumption of authority by municipal corporations to issue bonds by virtue of their general corporate power is a recent one. It has always been denied by many courts of the highest respectability. In my judgment, it should never have been admitted.

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So dangerous a power should be expressly and deliberately conferred, so that the taxpayer may be protected by prudent guards and limitations. Whenever the power to issue bonds may become necessary for the prosecution of some work or improvement involving large cost, or for any other purpose, the power can be conferred by the legislature, with proper restrictions. But, in my judgment, no such authority ought to be implied from the general grant of corporate powers.

But it seems to me that the provisions of the charter of the city of Galveston clearly exclude the power to issue bonds to pay for sidewalk improvements.

The same section of the charter (sec. 8, art. 3, title IV), which confers upon the city council the power to construct sidewalks, points out with minuteness and precision the manner in which the cost of their construction is to be defrayed. There is no escape from the language: "The cost of construction of sidewalks shall be defrayed by the owners of the lot or part of lot or block fronting on the sidewalk," and "the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot on which it fronts." Here is a designation of the property which is to pay, and of the manner in which payment is to be enforced. These provisions exclude any other method of payment. They clearly exclude the idea that the city may pay for such pavements by issuing its coupon bonds, bearing ten per cent. interest, and payable to bearer in fifteen years. *The Mayor v. Ray*, 19 Wall., 468.

It is no answer to this to say that the city may, nevertheless, enforce payment from the owners of the lots. Suppose the lots do not pay the cost of the sidewalks? The city, by its issue of bonds, has made itself liable, and will have the deficiencies to meet. The city could not be made liable for these deficiencies if it had not assumed the liability by the issue of its bonds. *Lake v. Williamsburg*, 4 Denio, 520; *McCullough v. The Mayor of Brooklyn*, 23 Wend., 458; *Baldwin v. Oswego*, 1 Abb., 62; *New Albany v. Sweeney*, 13 Ind., 245.

The city undertakes to pay in the first instance for these sidewalks, and to take the risk of reimbursing itself from the property owners. This is a clear departure from the authority

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conferred by the charter. "A corporation can act only in the manner prescribed by the act of incorporation which created it." *Head v. Insurance Company*, 2 Cranch, 127.

The city cannot assume a primary liability for these improvements. *Reock v. The Mayor of Newark*, 33 N. J. Law Rep., 131; *New Albany v. Sweeney*, 13 Ind., 245; *McCullough v. The Mayor of Brooklyn*, 23 Wend., 458.

The ordinance of August 19, 1873, which provides for the construction of the sidewalks, also declares that the cost of their construction shall be a charge against the property fronting thereon, and shall be assessed against the same. It then prescribes how the assessment shall be paid or its collection enforced. This, it seems to me, exhausts the power of the city council on this subject. It surely could not have been within the contemplation of the legislature that the city council, after taking these steps specially authorized by the charter, and amply sufficient for the payment of the cost of sidewalks, should then provide that the city itself should assume the primary liability, and advance the cost for the lot owners by an issue of its coupon bonds, payable to bearer in fifteen years.

My conclusions on this branch of the case may therefore be summed up as follows:

1. The power to borrow money and issue bonds for sidewalk improvements must be conferred upon the city council of Galveston before that body can assume to perform these acts.

2. This power is not inherent in a municipal corporation.

3. It is not expressly conferred by, nor can it clearly be implied from, any provision in the charter of Galveston.

4. The power is excluded by provisions found in the charter:

- (a) By the provisions for raising money by taxation for general and special purposes.

- (b) By the provision for issuing bonds, which is limited to a specific purpose, and that purpose not being sidewalk improvements.

- (c) By the provision that the cost of sidewalk improvements shall be borne by the owners of the abutting lots, and shall be collected by assessments on the abutting property.

In my judgment, the assumption by the city council of author-

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ity to issue these bonds for sidewalk improvements was not only unauthorized by the charter, but was a clear and flagrant violation of its meaning and spirit.

The result of the views above expressed is:

1. That the plaintiffs have not by their pleadings shown a good cause of action against defendant, for want of an averment that they had performed the conditions precedent, which were necessary to be performed in order to make the contract, even if authorized, binding upon the city; and,

2. That neither the city council of Galveston, nor any committee of its appointment had authority to make the contract sued on. It is therefore, absolutely null and void.

The demurrer to the petition of plaintiffs as amended is therefore sustained.

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HENRY NEILSON VS. MARIANA TREVINO GARZA.

1. The right to make inspection laws is not granted to congress, but is reserved to the states; nevertheless, it is subject to the paramount right of congress to regulate commerce with foreign nations and among the several states.
2. If any state, as a means of executing its inspection laws, imposes any duty or impost on imports or exports, such duty or impost is void if it exceeds what is absolutely necessary for executing such inspection laws, but:
3. As the article of the constitution of the United States which prescribes the limit within which inspection charges shall be kept, goes on to provide that "all such laws shall be subject to the revision and control of congress," congress is the proper authority to decide whether a charge or duty is or is not excessive.
4. Therefore if a law passed by a state is really an inspection law, it must stand until congress sees fit to alter it, even though the fee allowed by it is in effect an impost or duty on imports or exports.
5. The scope of inspection laws is very large and is not confined to articles of domestic produce or manufacture, but applies also to articles imported and to those intended for domestic use.
6. The act of the legislature of Texas, approved October 14, 1871, and the further act, approved March 23, 1874, entitled "for the encouragement of stock-raising and the protection of stock-raisers," are inspection laws and are constitutional.

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IN EQUITY.

Heard upon pleadings and evidence for final decree.

Messrs. Stephen Powers and *Nestor Mazan*, for complainant, cited *Gibbons v. Ogden*, 9 Wheat., 203 ; *Brown v. Maryland*, 12 id., 419 ; Story on the Const., secs. 1004, 1017, 1024 ; *Clintman v. Northrop*, 8 Cow., 46 ; *Hancock v. Sturges*, 13 Johns., 331 ; *Ferris v. Coles*, 3 Caines, 212 ; *Shoemaker v. Lansing*, 17 Wend., 327.

Mr. J. R. Cox, for defendant.

BRADLEY, Circuit Justice. The complainant in this case resides in Matamoras, Mexico, and is largely engaged in the business of importing hides from that city to Brownsville, in Texas, and sending the same thence via the port of Brazos Santiago, in Texas, to New York.

The defendant is inspector of hides and animals for Cameron county, Texas, at Brownsville, appointed and acting under an act of the legislature of Texas, approved October 14, 1871, and a further act, approved March 23, 1874, entitled for "the encouragement of stock raising and the protection of stock raisers." By virtue of his said office, the defendant claims and exercises the right to inspect the hides imported as aforesaid by the complainant, and to exact and receive, and does exact and receive therefor, in accordance with said law, fees at the rate of from six to ten cents per hide, according to the number inspected.

The complainant contends that this exaction is in reality an impost or duty on the importation or exportation of said hides, and that it is contrary to those clauses of the constitution of the United States which declare that congress shall have power "to regulate commerce with foreign nations and among the several states;" and that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

It is not pretended that congress has granted any consent in the case; and the complainant insists that congress, in making the importation of hides free from duty, has regulated the subject, and no state regulation can have any force or effect, but all such regulations are void.

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If the state law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes with the power of congress to regulate commerce, and if it does thus interfere, it may still be valid and binding until revised and altered by congress.

The right to make inspection laws is not granted to congress, but is reserved to the states; but it is subject to the paramount right of congress to regulate commerce with foreign nations, and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the state legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, in another case. As the article of the constitution which prescribes the limit goes on to provide that "all such laws shall be subject to the revision and control of congress," it seems to me that congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive.

If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it.

Then we are brought back to the question whether the law is really an inspection law. If it is, we can not interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods.

The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported

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them, etc., duties which belong to the entry of goods, and not their inspection.

No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice MARSHALL, in *Gibbons v. Ogden*, says: "The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or it may be, for domestic use." 9 Wheat., 203; Story on the Const., sec. 1017.

But in *Brown v. Maryland*, he adds, speaking of the time when inspection takes place: "Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land." 12 Wheat., 419; Story on the Const., sec. 1017. So that, according to Chief Justice MARSHALL, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation. All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article.

Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict., *verb.* Inspection.

The removal or destruction of unsound articles is undoubtedly, says Chief Justice MARSHALL, an exercise of that power. *Brown v. Maryland*, *supra.*, Story on the Const., sec. 1024. "The object of the inspection laws," says Justice SUTHERLAND, "is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets." *Clintman v. Northrop*, 8 Cow., 46.

It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well.

An examination of some of the actual inspection laws of the

different states shows that this is the fact: Thus, in Alabama, the city authorities of Mobile are authorized to appoint inspectors, and to adopt regulations (to be approved by the governor) for the inspection of staves, tobacco, pitch, tar, turpentine, rosin, fish, flour and oil, within the limits of the city. Many of these articles must be articles of import.

In Massachusetstts, fish intended for exportation are to be inspected, whether inspected previously in another state or not. *Pearson v. Purkett*, 15 Pick., 264.

In Kentucky, under the inspection laws of that state, imported salt cannot be sold in the state until it has been inspected, and three cents inspection fees are chargeable for each barrel inspected. The inspection laws of North Carolina are very full, and, amongst other things, provisions and forage imported from out of the state, such as beef, pork, fish, flour, butter in firkins, cheese in boxes, hay or fodder, bacon in hogsheads, etc., must be inspected before they can be sold, on pain of \$100 penalty, and a scale of inspection fees is fixed by law.

It is true the constitutionality of these laws has not been tested, but they show what range inspection laws have taken, and what is generally regarded as within their scope.

Now, the law in question is a general law of the state of Texas; it purports to be an inspection law, to encourage stock raising and to protect stock raisers; it makes each county of the state, except certain counties named, an inspector's district, for the inspection of hides and animals; and creates the office of inspector, to be elected by the voters of the county; it requires of him a bond and oath of office; it requires him to keep a book of records of his inspections; it requires him to examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment; and all animals driven or sold in his district for slaughter to packeries or butcheries; it directs the method of inspecting, branding and recording animals and hides; it requires him to prevent the sale or removal out of the county of hides or animals upon which the brands can not be ascertained, unless identified by proof, etc.; it gives him power to seize and condemn unbranded animals or hides. Various other regulations are imposed in the act. By

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the sixteenth section, it is provided that any person may ship from any part of the state any hides or animals imported into the state from Mexico, and shall not be required to have the same inspected: *provided*, he has first obtained the certificate of the inspector or deputy inspector of the county into which the same were imported, certifying the date of the importation thereof, the name of the importer and of the owner, and of the person in charge of the same, the name of the place where the same were imported, together with the number of hides and animals so imported, and a description of their marks and brands (if any there be) by which the same may be identified. By the 17th section, it is declared that inspectors shall be allowed to charge and collect the same fees for the services which they are authorized to perform by the terms of section 16 as are allowed in other cases thereafter provided.

The fees referred to are those allowed for inspection, which are, as before stated, from six to ten cents per hide, according to the number inspected.

Now, it is contended that the examination and certificate required by the 16th section, in order to be allowed to export out of the state hides imported from Mexico, is not an inspection, but is expressly denominated otherwise. "Shall not be required to have the same inspected," are the words, it is true. But the thing which is required, though not such an inspection as is usual and customary in other cases, is, nevertheless, an actual inspection. The exporter must obtain the certificate of the inspector, or his deputy, of the county into which the hides were imported, certifying (note what things are to be certified) the date of the importation, the name of the importer and of the owner, and of the person in charge, name of the place where imported, number of hides and animals imported, and description of their marks and brands, if any there be, by which they can be identified.

What is this but inspection? The object is to subject the hides or animals to the examination of the official inspector, that he may note everything about them, serving to their identification, ownership, etc.

I do not say that such an inspection as this is necessary or ex-

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pedient; but it is inspection; and at such a place as Brownsville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas.

The fee or duty exacted may be excessive; but if so, congress can regulate that. Our only concern with the case is to know whether the acts required by the state law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character; and that the acts of the defendant for which the fees exacted by him were charged were fairly performed under said inspection law; and that the fees are valid charges, until they shall be altered by congress.

The bill is therefore dismissed with costs.

THE CITY OF BROWNSVILLE VS. MARIA JOSEFA CAVAZOS et al.

(Before BRADLEY and MORRILL, JJ.)

1. By a law of Texas, a judgment against the plaintiff in an action of trespass to try title is conclusive, unless he commences a second action within a year: *Held*, that the institution of a suit within the year by the original defendant, against the grantees of the original plaintiff for the same property, relieved the latter from the necessity of commencing suit within the year. They could defend their title in this second suit, and the claim of *res judicata* by the plaintiff in the second suit would not hold.
2. Where, in an action of trespass to try title, the grantees of the plaintiff, who had lost his suit, neglect to bring a second action within a year, but the defendant in the first action sues the grantees of the plaintiff in that action for the same property, within a year after the determination of the first suit, and said grantees file a plea in the second action in the nature of a reconvention, claiming title to the property in dispute, and demanding damages for trespass thereto committed by the plaintiff: *Held*, that the plea was equivalent to a new action, and the said grantees were not concluded by the judgment in the first action.
3. The court should take judicial notice of the laws of a state whose territory once included the lands in controversy in the suit, on the ground that the laws of the former sovereignty of a country, which still affect its landed estates, are to be regarded as domestic and not foreign laws.

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4. The decree of the congress of the state of Tamaulipas, of October 15, 1827, and the proceedings thereunder, did not divest the title of the owners of the land taken for the ejidos of the city of Matamoras, nor transfer their title to the city; nor was it an adjudication *in rem* for the expropriation of said lands without compensation, reserving to the owner the right to obtain compensation by applying therefor. The title could not be divested without compensation to the owners.
5. The validity of said decree could not be called in question, it being the act of the highest tribunal known to the laws of Tamaulipas, invested with supreme judicial as well as legislative authority, and the lands affected by it being at the time within the territory of that state.
6. A resolution of the congress of the state of Tamaulipas, passed on October 20, 1848, after the lands in dispute had become a part of the territory of the state of Texas, is not binding as *res judicata* upon the parties in this case; but as an authority on the law of Tamaulipas, bearing on the construction of the decree of October 15, 1827, it is of the highest value.
7. Expropriation is a seizure of so much of the private owner's property as is necessary for the public use. When the public purpose is accomplished, or has ceased to exist, the residue of the property belongs to the original owner.
8. But this reverter must be subject to any *bona fide* rights that may have lawfully accrued in the meantime; thus when citizens have acquired a right of perpetual occupancy of the expropriated lands, at a certain rent or any higher degree of title, they could not be deprived of it.
9. The charter of Brownsville of 1853 did not confer upon that city any title or interest belonging to the state of Texas in and to the land which was owned by the town of Matamoras on December 18, 1836.
10. Where there was a mixed possession of the property in controversy, and had been a continual contest of the parties over it, and absence of actual possession by either party of a great portion of the property, and a litigation of long standing respecting the title to it: *Held*, that no plea of prescription by either party would hold good.

This was an action of trespass to try title. The parties waived a jury and submitted the issues of fact as well as of law to the court.

The lands in controversy were occupied by the city of Brownsville, Texas, opposite Matamoras, Mexico. They had been part of the ejidos, or town tract, of Matamoras, which extended on both sides of the Rio Bravo or Rio Grande. Texas chartered the city of Brownsville in 1852, and granted to it these lands, claiming them as part of the public domain. This charter was repealed in 1852. A new charter was granted in 1853, confirming to the citizens all their rights, but not in terms renewing the grant of the lands. This was the city's title.

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The defendants represented the original owners of the tract, and contended that the ejidos were never lawfully expropriated for public use; the land owner having never been settled with for the lands, which was a prerequisite under the constitution of Tamaulipas, under which the expropriation was attempted in 1826. Hence, the defendants claimed title under the original land owner, whose grant was made in 1781, and was not disputed.

This was a second suit to try this disputed title. The first was commenced by Basse and Hord against the city of Brownsville in 1854, and terminated in June, 1872, in favor of the city. (See *Brownsville v. Basse and Hord*, 36 Tex., 461.) Stillman and Hale, original defendants in the present suit, purchased out Basse and Hord whilst the first suit was pending.

By a law of Texas (Paschal's Dig., § 5298), a judgment against the plaintiff in trespass to try title is conclusive, unless he commences a second suit within a year afterwards. In this case the defendant in the first suit commenced this second suit, and the defendants did not institute any suit within the year.

This raised a question of *res judicata*, but the court held, as the following opinion shows, that the institution of a suit by the original defendants against the grantees of the original plaintiffs relieved the latter from the obligation of commencing a suit; that they could defend their title in this suit.

At all events, within the year, the defendants in this suit had filed a plea, setting up that they were owners of the land claimed by the plaintiff, and demanded damages for trespass committed thereto by the plaintiff. The court held this to be substantially a plea in reconvention, and allowed the defendants to amend it so as to make it more strictly such a plea in form as well as in substance.

During the progress of the trial, a question of evidence was raised, whether the laws of Tamaulipas, in whose limits the premises in question formerly lay, must be proven, or could be judicially noticed by the court. It was held, that the court should take judicial notice of them, on the general ground, that the former laws of a country, still affecting its landed estates, are to be regarded as domestic and not foreign laws, as is done

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in Louisiana with regard to the old French and Spanish laws, and in common law states with regard to the old English laws. *Ennis v. Smith*, 14 How., 426; *United States v. Turner*, 11 id., 664.

Messrs. Nestor Maxan, Stephen Powers and T. N. Waul, for plaintiff, cited, *Blair v. Odin*, 3 Tex., 288; *Lewis v. San Antonio*, 7 id., 300; *De Varaigne v. Fox*, 2 Blatch., 95; *Bissell v. Haynes*, 9 Tex., 584; *Bass v. Fontleroy*, 11 id., 698; *Townsend v. Greeley*, 5 Wall., 326; *United States v. Rocha*, 9 id., 639, 641; Recopilation de las leyes de las Indias, lib. IV., tit. 5; law 6 (2 White's Recop., 44, marg., 34); Constitution of Tamaulipas, arts. XIII, XCII; *Refugio v. Byrne*, 25 Tex., 193; *George v. Thomas*, 16 id., 74; *Guitard v. Stoddard*, 16 How., 512; *Glasgow v. Hortiz*, 1 Black, 601.

As to necessity of compensation. Cooley Const. Lim., 560; *Railroad Co. v. Ferris*, 26 Tex., 601; 2 Kent's Com., 339, note (b); *Rogers v. Bradshaw*, 20 Johns., 744; *Smith v. Taylor*, 34 Tex., 606.

Action of authorities conclusive. *Strother v. Lucas*, 12 Pet., 437; *Jenkins v. Chambers*, 9 Tex., 167.

Authority of the congress of Tamaulipas. Const., art. XCII; *Goode v. McQueen's Heirs*, 3 Tex., 256; *Houston v. Robertson*, 2 Tex., 25; *United States v. Palmer*, 3 Wheat., 610; *Foster v. Neilson*, 2 Pet., 309; *United States v. Arredondo*, 6 Pet., 711; *Garcia v. Lee*, 12 id., 520; *Williams v. Insurance Co.*, 13 id., 415; *Luther v. Borden*, 7 How., 56; Halleck's Internat. Law, 117; Wheat., 161, 165; *Elmendor v. Taylor*, 10 Wheat., 152, 169, 169; *Powell v. De Blane*, 23 Tex., 76; *Cavazos v. Treviño*, 35 id., 165.

The act of 1850 (1st charter of Brownsville) is equivalent to office found and regrant. *Refugio v. Byrne*, 25 Tex., 200; *United States v. Repentigny*, 5 Wall., 267; *Bennett v. Hunter*, 9 id., 336; *Weber v. Harbor Com'rs*, 18 id., 71.

Texas was legitimate successor to the rights of the city of Matamoras. *Blair v. Odin*, 3 Tex., 297; *Chouteau v. Eckhart*, 2 How., 374; *Goode v. McQueen's Heirs*, 3 Tex., 241; *United States v. Repentigny* 5 Wall., 276.

The grant of 1850 was irrepealable. Cooley on Const. Lim.,

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235-239; *Schulenberg v. Harriman*, 21 Wall., 44; *Rice v. Railroad Co.*, 1 Black, 358; *Brownsville v. Basse and Hord*, 36 Tex., 501.

Messrs. J. R. Cox, W. P. Ballinger and T. M. Jack for defendants, cited, *Bass v. Fontleroy*, 11 Tex., 698; the act to confirm old patent, passed February 10, 1852, took effect April 1, 1852; the act to incorporate Brownsville, of February 7, 1853; *Chouteau v. Eckhart*, 2 How., 373; *Townsend v. Greeley*, 5 Wall., 336; *McMullin v. Hodge*, 5 Tex., 82; Cooley on Const. Lim., 507, 508; *Mitchell v. Bass*, 26 Tex., 272.

On the principal points involved in the case, BRADLEY, Circuit Justice, delivered the following opinion:

The property in question is within the boundary lines of a tract of fifty-nine and one-half leagues called the Espiritu Santo tract, granted by the Spanish government to one De la Garza in 1781, which grant was recognized by the legislature of the state of Texas, by the "act to relinquish the right of the state to certain lands therein named," approved February 10, 1852. It is conceded by both parties that for several years prior and up to the year 1826, one Dona Maria Francisca Cavazos was seized of the Espiritu Santo tract (including the lands in dispute) by regular deraignment of title under said grant. Madame Cavazos died in 1835, and devised the Espiritu Santo tract to three parties (one of whom was Dona Maria Josefa Cavazos), who, by an act of partition between the parties, became seized of that portion of the tract on which the premises in dispute are situated. A portion of these premises she subsequently conveyed to other persons, under whom the other defendants claim by regular deraignment of title. So that the defendants have shown title to the land in dispute for the several parts which they respectively claim, unless the plaintiff can show a better title. This the plaintiff, the city of Brownsville, attempts to do.

The title set up by the city is a title by a proceeding for expropriation, by which, as they allege, the premises in dispute were expropriated as part of the ejidos (or town lands) of the city of Matamoras in 1826 and 1827.

To explain the nature of this claim, it is necessary to advert to

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the fact, that by the Spanish laws, which were in operation in Mexico, every corporate town became, by virtue of the act of incorporation, entitled to lay out and appropriate for the public use of the town, for streets, squares, building sites and small holdings or *labors* for the people, a town tract of four square leagues, to be two leagues square when admissible. The text of the law is found in 2 White's Recop., 44 (marg. 34) sec. 59. And see *Chouteau v. Eckhart*, 2 How., 373; *Townsend v. Greeley*, 5 Wall., 336; *Hart v. Burnett*, 15 Cal., 542.

Mexico separated from Spain about the year 1821, and the several states adopted constitutions of government, retaining, however, the Spanish laws as far as they were applicable to their new circumstances. Amongst the rest, the state of Tamaulipas, which comprised the territory on both sides of the Rio Grande, in the lower part of its course, adopted a constitution in 1825, by the XIIIth article of which it was declared as follows: "Neither the congress nor any other authority shall be able to take the property, even that of the least importance, of any private individual. When it shall become necessary for an object of a common recognized utility to take the property of any person, he shall first be compensated upon the examination of arbiters appointed by the government of the state and the interested parties." This was also substantially the old Spanish law.

On the 28th of January, 1826, the congress of Tamaulipas constituted Matamoras (before called Refugio) a town, with power to take the necessary proceedings to ascertain the title to the land on which it was established, causing indemnification to be made agreeably to law, if it should belong to an individual.

The town council in due time proceeded to take measures to lay out the ejidos. They caused the land owners to be notified and a survey to be made, in August, 1826. This survey took for its central point the center of the public square in Matamoras, and the ejidos was made to embrace a tract two leagues square, extending one league north, one league south, one league east, and one league west of this point. It was thus made to extend across the Rio Grande, and to include about a league and a half of the land of Madame Cavazos, which league and a half is the present site of the city of Brownsville, and is the property in

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dispute. The survey having been made, the next thing to be done to condemn the land for the ejidos, or town lands, was to make the required indemnification to the owner. Before this was done, the property, according to the constitution, could not be taken by the city.

But here a difficulty occurred. The indemnification must be made upon the examination of arbiters appointed by the government of the state and the interested party. But Madame Cavazos refused to coöperate in the matter; she opposed the whole proceeding. It took from her her best land, along the river front, and even took the farm which she had under her private cultivation. Various efforts were made to compose the difficulty, but in vain. At last the state congress, on the 15th of October, 1827, made a decree to the following effect: "The government, in the use of its powers, will see that the civil authorities of Matamoras compel Dona Rita Giron (another contestant) and Dona Francisca Cavazos to obey the constitution and the laws. If, being notified the second and third time, those ladies refuse to appoint arbiters for the corresponding indemnification of the lands which are to be taken for ejidos, the ayuntamiento will proceed to their occupation and survey without citing them further.

"Should the parties or their heirs hereafter ask for the indemnification of their lands, and be willing to name an arbiter, as required in the XIIIth article of the constitution of this state, a new measurement shall be made, if they desire it, and the land they asked for before shall be given them as a recompense. This resolution shall be communicated to the government, in order that, acting in accordance with it in the present case, it may serve as a general rule in all others that may occur, until a basis to be observed may be established by law."

The effect of this decree is much controverted by the parties. The plaintiff insists that it was an adjudication *in rem* for the expropriation of the lands without compensation to the owners, if they continued recalcitrant, reserving to them, however, a right to obtain compensation at any future time by applying therefor. The defendants insist that it merely authorized a user of the lands without expropriation, until the parties chose to accept the terms proposed by the government.

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The validity of this decree we are not at liberty to question. It was an act of the highest tribunal known to the laws of Tamaulipas—a tribunal invested with supreme judicial as well as legislative authority. It does not belong to us to say that its acts or decrees were unconstitutional. *Houston v. Robertson*, 2 Tex., 25–28.

So far as we are concerned, it was sole judge of its powers, and its acts must be accepted by us as having undoubted validity. The true construction and effect of the decree are alone to be sought by us. To arrive at these, we are authorized to look at all the circumstances of the case, the conduct of the parties, the government's own views on the subject, and any other light within our reach.

The most obvious view of the question, as it first presented itself to my mind, was this: That as the land owner refused to avail herself of the privilege accorded to her by the constitution, the legislature could authorize the taking of the land without compliance with the condition of first making compensation, and that this was what the legislature did; that the taking which ensued was followed by all the incidental rights and transfer of title which accompany a taking in any case; in other words, that the expropriation was complete, but the party had a reserved right to claim indemnification whenever she chose to ask for it and comply with the constitutional requisition. The district judge took a different view, and held that the occupation authorized by the decree was a mere usufructuary one, liable to be terminated in case of failure to make due compensation, when it should be asked for, and not ripening into title until such compensation should be made. The language of the decree, compared with that of the constitution, lends force to this view. The word used in the constitution is property (*propiedad*); the word used in the decree is occupation (*ocupacion*). These words seem to have about the same distinction in the Spanish law as in the English. One indicates title; the other mere possession and use. Occupation is possession. It confers title where no owner existed before, or where the former owner had abandoned the thing occupied. But where an ownership or dominion already exists, it amounts only to possession and use.

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The city authorities of Matamoras proceeded to treat the land as ejidos, granting a large number of *labors*, or town holdings on it; but the question of indemnity would not be laid. It was agitated until the death of Madame Cavazos, in 1835, and afterwards until the United States took possession of the country in 1848, up to which period the state of Tamaulipas continued to exercise *de facto* jurisdiction over the country.

In 1831, the matter was brought to the attention of the general government again, which, on the 29th of June in that year, made an order that the ayuntamiento of Matamoras should give information respecting the state of the affairs of the ejidos, and directing the first alcalde to order the owners of the land to present themselves at the capital, Victoria, in person or through an agent, within a reasonable time, to be named, so that, hearing the attorney general of finance, the indemnification to all might be agreed upon. In 1834, this order was served by the city authorities on the owners a second time, notifying them that this would be the last notice, and, if they did not appear, they would suffer the damages of the law for interposing obstacles in so important an affair. All this seems to indicate on the part of the city a conviction that its title was not entirely beyond dispute, and needed further support, and on the part of the government a like view of the case.

The answer of Madame Cavazos to this summons is given in evidence. She was told to appear before the supreme government and present the titles of the property, in order that the dimensions of the ejidos lands which affected her might be determined. She declined to go or send, giving as an excuse that she was too old, but said in substance that she would receive her indemnification in money, and would submit to whatever the government might order. This is her last appearance on the scene. No evidence is given to show that any money was ever paid, or that any mode of estimating the amount due, different from that required by the constitution, was ever devised by the government. The defendants show some supplementary proceedings taken in 1841, for a resurvey of the ejidos, in which the Cavazos family were represented, and, it seems, acquiesced.

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But the survey was not satisfactory to the town authorities, and they refused to receive it, although they had ordered it.

The defendant also offers in evidence certain proceedings which took place before the state congress in September and October, 1848. The nature and object of these proceedings were not distinctly explained to us during the reading of the evidence, and we held them under advisement. We have since examined them, and find them to be this: After the treaty of Guadalupe Hidalgo, which was signed May 30, 1848, the Mexican authorities yielded all claim to jurisdiction east of the Rio Grande. Thereupon the city authorities of Matamoras proposed to sell out to private parties—speculators from the United States—the ejidos of the city on the Texas side. John Treanor, one of the now defendants, representing the Cavazos family, and particularly Dona Josefa, one of the defendants, applied to the general government for an injunction (or what is equivalent thereto) to prohibit the ayuntamiento from making any such sale, on the ground that it had no right to do this, and that it would injure the owners. The ayuntamiento put in an answer, setting up the claim of the city. The matter was presented to the congress of Tamaulipas, who referred it to a committee, and that committee made an elaborate and able report, in which they take the ground that, as compensation had never been made, which they held to be an indispensable requisite, the right of property was never perfected, and that as no expropriation could now be made, in consequence of the change of government, the original owners were entitled to receive back their lands, and were not confined to compensation; that alienation of the lands would not be a public use, but a private speculation. They say “the right of expropriation has another and more noble origin; its object is not to increase the receipts of the public revenues, but to provide for the well-being of the community.” They add that it might also produce complications with the government of the United States of the North, which would, perhaps, justly contend that property belonging to a municipal body must be considered as public property. Hence, the committee recommended the congress to adopt a resolution to the effect that, it being provided by the XIIIth article of the

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former constitution and the LXXIst article of the present that in no case can expropriation be made without previous compensation; and this not having been made as to the ejidos, situated on the left bank of the Bravo, the ayuntamiento of Matamoras has not acquired a right of property in that portion, and consequently its former owners preserve it. This resolution was adopted by the congress on the 20th of October, 1848.

We reject these proceedings as evidence of any *res judicata* binding on the parties in this case, because the congress of Tamaulipas had ceased to have any jurisdiction over the land in question. But as an authority on the law of that state, and as bearing upon the construction and effect of the decree of October 15, 1827, it possesses the highest value.

The congress had jurisdiction of the parties before it, and of the subject matter.

The city of Matamoras proposed to make a sale and conveyance which would have greatly injured and embarrassed the owners of the Cavazos title, by casting a cloud upon it, and perhaps inciting litigation. They applied to the supreme government for relief, and that government decided against Matamoras. It is a decision of the legal question on a case properly made, and, as such, it is worthy of great respect at our hands.

In the light of this decision, and of the other transactions which took place after the decree of October 15, 1827, we are brought to the conclusion that the decree and the proceedings under it did not have the effect to transfer to the city of Matamoras the title to the lands.

But if we are wrong in this conclusion, there is another point that is fatal to the claim of the plaintiff. As a corporation, the existence of the plaintiff commenced with the act of incorporation, passed February 7, 1853, and it has never received from any source the title of Matamoras, if such title had been outstanding, and hence, not having any title of its own to stand on, it must fail in this action.

The only title on which it relies is its charter. But that confers no title. It confirms to the citizens of Brownsville, as incorporated by the act, all property, rights in action and claims to property which were held, owned, occupied and enjoyed by the

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citizens of said city under the previous charter of 1850, which had been repealed, but it confirms nothing and grants nothing to the corporation of Brownsville. The first charter did; it relinquished to the corporation all the right, title and interest of the state in and to the land that was owned by the town of Matamoras on the 19th of December, 1836. But this charter was repealed on the 1st of March, 1852, and with it the estate, if any was acquired, reverted to the state of Texas. But on the supposition that on the 19th of December, 1836, there was an outstanding estate in the city of Matamoras, in virtue of the expropriation proceedings, that estate, according to the weight of the later authorities, would revert to the original owners of the land when the purpose of the expropriation became incapable of further accomplishment, or ceased to exist. Expropriation is a seizure of so much of the owner's property as is necessary for the public purpose. A seizure of more, by adverse proceedings, would be an abuse of the power. It follows, therefore, that when the purpose is accomplished, or has ceased to exist, the residue of the property belongs to the original owner. But this reverter must be subject to any *bona fide* rights that may have lawfully accrued in the meantime. If the citizens of Brownsville, as holders of *labors*, acquired a right of perpetual occupancy at a certain rent, or any higher degree of title, they could not be deprived of it. And this was probably what was intended to be expressed in the charter of 1853.

The question whether any rights of beneficial ownership, requiring the constitution of a trust for their support, existed in the citizens of Brownsville, as a body, by virtue of the charter of 1850, after its repeal, was brought before the supreme court of Texas in the case of *Bass v. Fontleroy*, 11 Tex., 698, and the court held that all lands held by the city for public purposes were liable to be disposed of by the legislature; and that all grants and trusts created by the first charter were extinguished by its repeal. But the individual citizens, as such, might have rights which were valuable, and which ought to be restored to them. This is all that was done by the new charter of 1853.

We are of opinion, therefore, that the state did not convey any property to the present corporation of Brownsville, even if it had

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any to convey; but we are also of opinion that the state had nothing to convey, as derived from the corporation of Matamoras.

The conclusion follows that the defendants hold the title of the property in dispute under the Garza grant of 1781, duly confirmed by the act of 1852.

The plea of *res judicata* we do not think can be sustained. It is true that Basse and Hord, the parties under whom the heirs of Stillman and Hale claim, brought suit for the same property now defended for by them against the city of Brownsville in 1854, and a decision was rendered in favor of the city by dismissing the suit on the 27th of June, 1872, and no suit was brought by Basse and Hord, or the defendants, Stillman and Hale, within the year required by the statute of Texas; but they have a sufficient excuse for not bringing it. The city, within ten days after the termination of that suit, instituted this suit against them for the self same property.

In our judgment, this dispenses with the necessity of the defendants bringing a suit. The reason for it ceases. The object of the statute is, if parties are not satisfied with the result of one action, to compel them to relitigate the matters without unnecessary delay, and a year is fixed for the purpose. But the defendant in the former suit, the successful party therein, itself commenced the relitigation almost immediately. The object of the statute was answered, and it would be promoting unnecessary and vexatious litigation to require the present defendants to bring a suit also.

And, even if a plea of reconvention were necessary in order to satisfy the equity of the statute, we think that such a plea has been put in—not full and clear at first, but rendered so by amendment afterwards—which it was within the discretion of the court to allow.

As to the pleas of prescription, we think that, under the circumstances of this case, the mixed possession that has ever existed, the continual contest of the parties, the pending of litigation from 1854 to the present time, and the absence of actual possession by either party over a great portion of the property, no prescription can be claimed, and the decision of the case must rest on the documentary title.

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Our decision is in favor of the defendants, as follows:

We find against both parties in fact, on the issues of prescription; and, as a matter of law, we find for the defendants on the question of title, namely, that the defendants are seized in fee of the respective parts and portions of the lands claimed by the petition, for which they respectively defend, and that the plaintiff is not so seized; and, as a consequence of this finding, we also find the defendants not guilty, as they have severally pleaded; subject, however, to the disclaimer filed by the defendants—the lands and premises disclaimed not being embraced in this judgment.

And we give judgment for the defendants, that they severally recover the said lands in the parts and portions respectively claimed by them in the pleadings in the cause, and that, as to the action and demand of the plaintiff, they go thereof without day, and recover their costs.

MORRILL, District Judge, concurred.

GALVESTON, MAY TERM, 1876.

MARTIN A. DAVEY et al. vs. THE BARKENTINE MARY FROST
and cargo.

1. The extinguishment of a fire in a ship lying at the wharf of a city, by its fire department, does not entitle the firemen to salvage, even though there is no city ordinance requiring them to extinguish fires.

ADMIRALTY APPEAL.

This was an attempt of firemen to recover salvage of a vessel for extinguishing a fire which broke out in her while lying at the wharf of Galveston.

Messrs. Geo. Flournoy and J. Z. H. Scott, for libellants, cited *Spence v. Steamer Ch. Avery*, 1 Bond., 118; Lushington's Admiralty, 505; *The Tees*, 2 Parsons' Shipping and Admiralty,

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277; *Stevens v. S. W. Downs*, 1 New., 458; *LaTigue*, 3 Wash. C. C., 567, and claimed that as there was no law or ordinance making it the duty of firemen to put out fires, they were entitled to salvage.

Mr. T. N. Waul, for claimants.

BRADLEY, Circuit Justice. This is a libel for salvage. The libellants state that on the 11th of January, 1876, the barkentine Mary Frost was moored at a wharf in Galveston taking in cargo, and already had on board and closely stowed in the hold about 800 bales of cotton; that about 9 o'clock in the evening an alarm of fire was sounded throughout the city and port, and in response thereto the libellants went immediately to the wharf to which the vessel was moored and discovered flames and smoke issuing from her hold and cabin, and that she and her cargo were on fire; that the libellant Davey (who it appears was chief engineer of the fire department of the city of Galveston) called for the master of the vessel and asked him if he could manage the fire; that he answered he could not, and requested Davey to take control and save the vessel; that libellants and their assistants took control of the vessel, and, by means of fire engines and the assistance of firemen present and working under the direction of libellants, proceeded to extinguish the flames, and poured water into the vessel until her burning part sank and became submerged, and the fire became wholly extinct, and the vessel finally rested on the bottom; that the libellants and their assistants remained in charge for the purpose of raising the vessel again, and on the following day procured a steam tug and a barge with which they conveyed an engine alongside and pumped the water out of the vessel, and raised her. The libel goes on to state that the night was cold and that the libellants were subject to great labor and fatigue in saving the vessel. Wherefore they demand salvage.

The answer of the master admits the fact of the fire, and the assistance given by the libellants in extinguishing it. He says, that he had obtained assistance from a vessel lying near, and, with a force pump, was keeping the fire in check, when Davey and others, wearing the uniform of the fire department, came to

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the wharf with fire engines and a company of firemen. He denies that he gave up the command of the ship to Davey, and says that Davey took no other charge than as an officer of the fire department; and that he and those assisting him represented themselves as firemen, and that they extinguished the fire by means of fire engines that belonged to the city of Galveston.

He says that the depth of water was only thirteen feet, and that it was not necessary to submerge the vessel, and that she only settled in the water to her deck. He says that he did not need the assistance of any other persons than his crew to pump the water out of the ship on the following day, and that he was actually pumping it out with his own pumps when the libellants came on board and insisted upon pumping out the water; and that he informed them that their services were neither needed nor desired; but that they forcibly proceeded to pump out the water contrary to his express directions. He insists that the libellants belonged to the fire department of Galveston, and that in rendering the assistance they did, they were acting in the strict line of their duty, and are not entitled to any salvage.

I have read the evidence, and find that the statements of the claimant are mainly true. Some of the libellants were not firemen; but all acted under the orders and directions of the chief engineer. There are always volunteer helpers at fires. It is an instinct of every good citizen to do all he can to suppress a fire. But the fact that some who were not enrolled in the service aided in putting out the fire does not detract from the truth of the general proposition, that the fire department extinguished this fire.

The services of the department were not required on the second day in pumping out the ship; and they were expressly told so. But it seems that the idea of the salvage must have already possessed them, and that they insisted on pumping out the vessel.

I cannot regard this case as any other than the extinguishment of a fire in a ship lying at the wharf of Galveston by the aid of the fire department of that city. The question is, whether it is a case for salvage. In my opinion, it is not. The firemen were merely engaged in the line of their duty. They only did

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what it was their duty to do. If they did more, it was services that were not necessary, and not required, but expressly declined.

It is said, however, that there is no duty imposed on the fire department of Galveston at all; that there was once an ordinance declaring such duty, but it had been repealed. No duty imposed on a man who unites with a municipal organization, whose only object is to extinguish fires; who wears the uniform of the department; who is supplied with engines, and ladders, and hose, and horses and all the apparatus for extinguishing fires? Do the citizens of Galveston, who furnish this apparatus, understand that the firemen are subject to no duty? The idea is preposterous. Duty does not always arise from express commands. It often arises from implied obligations quite as strong as those which are most clearly expressed. It needs no law nor ordinance to make it the duty of firemen to put out fires. Is there any express law that declares it to be the duty of a soldier to kill or capture his enemy in battle? His very profession makes it his duty. So does the profession of a fireman make it his duty to do his utmost to extinguish a fire any where in the city.

The attempt to make the performance of this duty a ground of salvage, when it is a ship that takes fire, is against wise policy. Are ships going to frequent a port where they are subject to salvage if they take fire and are aided in its suppression by the local fire department—the origin of the fire due, perhaps to a fire in the city itself?

The city authorities of Galveston did well to repudiate the claim in this case, as the record shows they did; and it is to be hoped that the fire department will not tarnish the luster which its noble sacrifices have justly earned for it, by repeating a demand of this kind.

Libel dismissed.

Wicks vs. Stevens.

JOHN W. WICKS vs. E. F. STEVENS.

1. When the question of the applicability of an invention to revolving cotton presses, other than portable ones, had been raised in the original application and abandoned, and therefore had not been inadvertently or accidentally overlooked, a reissue of the patent by which the invention is made to apply to stationary as well as portable presses is improper and void.
2. The alleged improvement to revolving cotton presses, patented to Rhodom M. Brooks in 1866, and extended in 1872, was known and used long before Brooks applied for his patent. The patent is therefore void.

IN EQUITY.

Heard upon pleadings and evidence for final decree.

The bill was filed to prevent an infringement of certain letters patent granted to one Rhodom M. Brooks for improvements in cotton presses, and for an account of profits. The complainant was assignee of Brooks' patents for a portion of Texas; and the defendant was an agent for the sale of cotton presses manufactured by one W. H. Reynolds, of New Orleans, under certain patents posterior in date to Brooks', and for different parts of the press. The complainant alleged that the latter were an infringement of Brooks' patent. The defendant placed himself on two grounds of defense: 1st, that Brooks' patents were void; 2d, that he did not infringe them.

A contest had taken place between one Douglass and others, assignees of Brooks, and Reynolds and others, in New Orleans, with partial success on each side; the defendant claiming, however, that the decision was substantially in his favor, and pleading it as *res judicata* in this case. But as the record in that case was not in a shape to render it conclusive on the question made in this case, it was not noticed in the opinion of the court.

The Brooks patents sued on were two: first, a patent for alleged improvements in screw presses, dated July 23, 1872; being a reissue of a patent for an improvement in portable revolving screw presses, dated November 6, 1866; secondly, a patent for an improvement on the original invention, dated April 14, 1868.

The claims in the reissued patent of 1872 were quite different from that in the original of 1866, and were apparently made in reference to all revolving presses; whereas, the original was con-

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fined to portable revolving presses, that could be carried from one place to another.

The defendant insisted that the extension of the new patent to all kinds of revolving presses, stationary as well as portable, rendered the reissued patent void, inasmuch as the question of the applicability of the invention to presses other than portable ones had been raised in the original application, and abandoned; and therefore had not been accidentally or inadvertently overlooked. But if the reissued patent was still to be confined to portable presses, then, that he did not infringe, for his presses were not portable ones; but were fixed in the gin house.

The defendant contended, further, that if the reissued patent was to be extended to all revolving presses, then it was void, because all the pretended improvements contained in it were known and used in stationary presses long before the date of Brooks' patent.

It was not seriously contended that the patent of 1868 was infringed by the defendant; the whole controversy rested upon the construction and validity of the reissued patent of 1872.

Messrs. W. P. Ballinger and Rhodes, for complainant, cited *Blake v. Stafford*, 6 Blatchf., 195; *Conover v. Dohrman*, id., 60; *Hailes v. Van Wormer*, 7 id., 443; *Wing v. Richardson*, 2 Cliff., 449; *Tompkins v. Gage*, 5 Blatchf., 268; *Roberts v. Harnden*, 2 Cliff., 500; *Whipple v. Middlesex Co.*, 4 Fisher, 41.

Mr. Mason, for defendant, cited *Curtis on Patents*, pp. 251, 256, 269, 289, 345 (n. 2), 329; *Gould v. Rees*, 15 Wall., 187; *Prouty v. Ruggles*, 16 Pet., 341; *Silsby v. Foot*, 14 How., 219; *Burr v. Duryee*, 1 Wall., 531.

BRADLEY, Circuit Justice. Construing the reissued patent of 1872 to apply to stationary as well as revolving presses, the question of infringement is not hard to determine. It had three claims: First, the combination of a revolving press-box, with follower and screw-rod and a stationary nut (or their mechanical equivalent), substantially as set forth. An inspection of the defendant's machine shows at once that it has this combination.

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The second claim is for a press box confined within a revolving frame composed of metallic bars and cross-ties, and a bed or bottom (or their mechanical equivalent), substantially as set forth. The defendant also uses this combination; the wooden bars, bolts and rods being mechanical equivalents of the metallic bars and cross-ties of Brooks' patent.

The third claim is for the collar surrounding the stationary nut and placed between the metallic cross-ties, or their mechanical equivalents, substantially as and for the purposes set forth. The apparent object of this collar is to steady the frame containing the press box, and to keep it plumb and perpendicular whilst revolving. The defendant, instead of a collar having the specific form of Brooks,' accomplishes the same object by an eye or hole in what he calls the metallic arch. This metallic arch with its eye is in fact a collar surrounding the stationary nut, substantially as and for the purposes subserved by the collar in Brooks' press. It is not placed between the metallic cross-ties described by Brooks, it is true, for the defendant does not use them; but the metallic arch is equivalent to the metallic cross-ties taken in connection with the cross-beam to which they are attached, so far as it affects the use of a collar. I consider the defendant's apparatus to be substantially the same thing as that claimed by the plaintiff. In my opinion, therefore, the defendant infringes all the claims of the reissued patent of 1872.

[The circuit justice having then examined the patent of 1866, and decided that the defendant did not infringe it at all, proceeded as follows]:

It appearing that the defendant infringes the patent of 1872, the next question to be solved is, whether that patent is valid.

1. Was it a legal reissue of the patent of 1866? The patent of 1866 was confined to portable revolving cotton presses. I assume that the reissued patent extends to all cotton presses, stationary as well as portable, for, if confined to the latter, the defendant does not infringe it. Had this extension to stationary presses been omitted in the original patent by accident or mistake, it might be corrected in the reissued patent. But its application to revolving presses generally was first claimed and then abandoned in the application for the original patent of 1866, and the

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claim as finally made by the patentee, and to secure which alone his patent issued, was for a combination applicable to portable presses only. It cannot be said, therefore, that a neglect to claim the combination as applicable to revolving presses generally was an inadvertence, accident or mistake. It was an exclusion, designed and understood at the time.

Attempts to grasp claims by means of reissued patents, which, whilst the evidence is fresh at the time of the original application, the patentee would not have the hardihood to make, are getting too frequent, and are too often acquiesced in by the patent office. Perhaps this is not to be wondered at when we consider the persistency with which claims once abandoned are pressed upon the department after the evidence of their futility has been forgotten.

2. But aside from this objection to the patent, there is abundant evidence to show that the alleged invention was known and used by others long before Brooks applied for a patent.

Under this head the following evidence has been adduced by the defendant:

First, he introduces the patent of one Elliott, granted in 1850, for an improved cotton press. This press had a revolving frame containing a press box, and a screw rod attached to the follower which pressed the cotton, and was operated in the same general way as Brooks'; but the nut was not stationary as specified in his first claim, being fixed in the cross beam of the revolving frame; nor was the press box confined within a revolving frame composed of bars and ties like those described in the second claim of Brooks, and it had no collar surrounding a stationary nut. Therefore, if these peculiarities of Brooks' press are material, he was not anticipated in the use of them by Elliott. In Elliott's press, the nut revolves with the press box and frame, and the screw rod does not revolve, being fixed in a cross beam, the ends of which slide up and down in grooves of the side frame. In Brooks' press, the nut is stationary, being fixed in the cross beam above, whilst the screw revolves with the press box and frame, being fixed to the follower. In the one, the rod is fixed and the nut revolves; in the other, the nut is fixed and the rod revolves. The result is the same in both cases, namely, the push-

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ing of the follower and the pressure of the cotton. The change is one of mere form, and is hardly the subject of invention. But there is other and abundant proof that both forms were in use long before the date of Brooks' patent.

[The circuit justice then examined the evidence of the witnesses in detail, on the subject of prior knowledge and use of the combinations claimed in Brooks' patent, and came to the conclusion that he was not entitled to be called the first and original inventor. He continued.] His press may be more neat and compact in its construction than other presses, and it may be a better press in every way; but if it is, he must rely on its comparative excellence and the consequent demand for it in the market, and not on a monopoly of the whole market for his compensation.

I find nothing elicited by the evidence of the plaintiff to refute the conclusions deduced from that of the defendant. Much of it is occupied with characteristics of the Brooks' press, which it possesses in common with other and older presses, or which have not been claimed in Brooks' patent as his invention. It must be remembered that revolving presses and portable presses, and presses with iron straps, etc., were known before Brooks applied for a patent, or he would have inserted a claim for them. Therefore, all the commendations bestowed on Brooks press (so called) for any of these matters, by witnesses whose observation had not extended beyond this press, go for nothing in the case.

In my judgment, the complainant's title to the combinations of parts which the defendant infringes has been successfully impeached; and on either of the grounds taken by the defendant, the bill must be dismissed.

Bill dismissed.

Ellsworth vs. The Bark Wild Hunter.

THOMAS H. ELLSWORTH VS. THE BARK WILD HUNTER.

Where the captain of a ship having goods on board was requested by the consignee to deliver them at once, and replied that he would begin discharging them at 12 o'clock noon, or soon after, and did so, and gave notice thereof to the consignee, who said his clerk would attend to them and take care that they were all removed from the wharf, and the clerk neglected to employ drays sufficient to carry off the goods before night, and a portion of them were left on the wharf during the night, and the captain of the ship piled them up and covered them with tarpaulins, and placed a watchman over them, and the ship's agent had general orders from the consignee not to store his goods: *Held*, that there was a good delivery of the goods, and the ship was not liable for damage done them by rain during the night.

ADMIRALTY APPEAL.

This was a libel on a contract of affreightment, and the question was whether the goods—certain boxes of tin—were delivered according to contract.

Mr. T. N. Waul, for libellant, cited *The Tybee*, 1 Woods, 358.

Mr. Thomas M. Jack, for claimant, contended that the circumstances of the case took it out of the decision of *The Tybee*.

BRADLEY, Circuit Justice. The bark Wild Hunter, captain Errickson, arrived in the harbor of Galveston on the 24th of October, 1871, having on board, amongst other things, over five hundred boxes of tin plate, consigned to the libellant, Thomas H. Ellsworth. The latter was anxious to get the tin, and his warehouse clerk, Daly, says that he carried a note from Ellsworth to the captain of the bark, on the morning of the 25th, asking for the tin, and that the mate and inspector of customs told him he could have it about twelve o'clock, or after dinner. Webster, the agent of the ship, says that Ellsworth called on him that morning to use his influence with the captain to get the tin discharged as soon as possible, to have it discharged at once. Webster directed the captain to get stevedores and commence discharging at one o'clock, and to stop at four. He gave notice to Ellsworth, who replied, "Daly will attend to it and have it all hauled up." About three P. M., only two or three drays were hauling; Webster told Daly he would have to put on more drays if he expected to get it up that night. He put on two more drays. Web-

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ster says that the orders from Ellsworth to his firm were never to store his goods; that he would remove them from the wharf if it took till nine o'clock P. M. to do so. Such orders had always been carried out by the firm and its employés. He says it was perfectly practicable for Ellsworth to have had all the freight which was landed carried to his warehouse that evening. The note taken by Daly to the captain in the morning, was as follows: "Now that your vessel is up to the wharf, we must ask you to do your best to give us some tin and tin plate; in fact we must get them to-day, cost what it will. We hope you will be able to give us them at once." Captain Errickson says it was in pursuance of this note that he engaged to discharge the cargo. Up to four o'clock he had discharged 550 cases of tin, all in good order and condition. The captain says that Ellsworth began to haul the tin between two and three, and at four o'clock P.M., he went to Ellsworth's office, and told him he would be unable to get the tin off the wharf unless he put more drays on to haul it. He put on three more, and at half past five two more; but 249 cases of tin remained on the wharf. At half past five, or fifteen minutes before six, the drays ceased hauling. The custom house officer and captain Errickson staid till seven, but no more drays came, and a night watchman was put on to watch the tin. At ten, the weather becoming stormy, the captain says he took the mate and carpenter and piled up the cases and covered all with two tarpaulins, of good quality, and waterproof. Next morning, the weather being clear, he began discharging the remainder, and between seven and eight the draymen began to haul away the tin. Between eight and nine libellant came to the ship. He said he was sorry any was left there over night; that he had left orders with his clerk to haul off all the tin the night before; that he did not think any of the tin had been damaged.

The mate and carpenter entirely corroborate the testimony of the captain.

I think it is clear from the evidence in this case, that there was a delivery of the tin. It was delivered at the owner's urgent request; he wanted it. If he had employed a sufficient number of draymen, he could easily have had it all carried to his store. Even after the draymen stopped work, it could have been done

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by working on into the evening. Ellsworth had given orders to have it all brought up; he supposed it had been. The difficulty was that his clerk did not employ enough drays.

To this hypothesis, it is objected that the captain attempted to take care of the tin by setting a watchman over it, and by piling it up on the wharf and covering it with tarpaulins. From this it is assumed that he knew the tin was at his risk. I do not think so. Seeing the rain coming on, he, as a matter of common prudence, did what any man would do under the circumstances. Delivered or not delivered, he did not want to see the tin spoiled. Besides, he knew that questions might be raised and that an ounce of prevention of litigation, as of anything else, is worth a pound of cure.

Then it is said that he had it hauled up to the store in the morning. This does not seem to be so. The draymen, anxious to finish the job they had begun, were there betimes in the morning, taking away the tin. The captain would naturally suppose that they were complying with orders received from Ellsworth.

It is said that the custom-house inspector refused to attend. On the contrary, he remained on the wharf till seven o'clock, waiting for the drays to come and take the tin.

Under the circumstances, and as Ellsworth had told the ship's agent not to store his freight (which is not contradicted), I think the goods were properly deliverable on the wharf, and that they were so delivered and were at the risk of the libellant.

I have not overlooked the testimony of the libellant himself, and of his warehouse clerk, Daly. The former admits that the captain promised him in the morning to discharge his freight that day; but he adds that he told the captain that he did not require the whole of the freight, but to give him some of it, adding that he supplemented this by two notes asking the captain to give him some of the tin-plate and block tin. Now we have seen the principal note. It says, "some tin and tin plate," it is true; but it adds, "in fact we must get them to-day, cost what it will. We hope you will be able to give us them at once." Ellsworth says the draymen informed him that no more goods would be delivered that night; but the inspector whom he met told

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him that some of them were on the wharf. He asked if they were protected, and was told that they were covered with tarpaulins. This must have been late in the evening. The libellant, however, seems to have been satisfied. This is the substance of Ellsworth's testimony, so far as it bears on the question. Taking this evidence all together, it does not materially contradict that of the other witnesses. I have already adverted to Daly's evidence. It does not materially alter the case.

I think the tin was delivered, and that the libel must be dismissed.

THE UNITED STATES VS. THE STEAMER MOLLIE. THE UNITED STATES VS. THE STEAMER BONITA.

1. Where a seizure is made on water and the proceeding is consequently in admiralty, and there is default, the court should use a wise discretion whether to require proofs or not.
2. In all such cases, proclamation to appear should be made and a decree entered for default and contumacy, and upon reading the libel and proceedings thereon, and with or without proof as the court may direct, such decree should be made as the nature of the case may require.
3. A small pleasure boat twenty-nine feet long and seven feet wide, without deck, propelled by a small steam engine with a cylinder of nine inches stroke and three and one-half inches diameter, run occasionally by its owners for amusement upon Buffalo Bayou below Houston, Texas, is not a vessel navigating the public waters of the United States within the meaning of the steam inspection laws.

This was a libel filed in the district court for penalties for nonobservance of the steamboat inspection law.

No party appearing to claim the vessel, the district court, on examining a witness as to its character, dismissed the libel, and the United States attorney appealed. No person yet appearing, the question arose as to the method of proceeding, namely, whether a decree of condemnation ought to be entered as of course for the default, or whether the United States attorney ought to prove the allegations of the libel.

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BRADLEY, Circuit Justice. The steamboat inspection law does not prescribe the method of recovering the penalties therein imposed; but as the libel in this case was for penalties for which the vessel is made liable, and subject to seizure, the mode of proceeding will be regarded as to be governed by the general act, sec. 923 of the Rev. Stat., which is based upon the 89th sec. of the revenue collection act of 1799. By this act, "If no person appears and claims such vessel, goods, etc., and gives bond to defend the prosecution thereof, and to respond the cost, in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law."

What is meant by hearing and determining according to law, is the point to be ascertained. The phrase has met with some judicial exposition; and it seems to be settled that the mode of hearing depends on the practice of the court in which the proceeding is conducted. If it is a court of common law, or if the proceeding is according to the course of the common law, the practice is one thing; if it is a court of admiralty, proceeding in due course of admiralty, it is another thing. On seizures for condemnation and forfeiture at common law, an information is filed, setting forth the offense and the ground of seizure, and praying the relief desired. This is the course on seizure made upon land. In this proceeding, proclamation is made on the return of the writ, and if default be made, a judgment of condemnation by default is entered, and an order of sale of the thing condemned. This is the course of proceeding in the court of exchequer in England. A complete record in such a case may be found in Parker's reports of Revenue Cases, 57, in the case of *Attorney General v. Lade*, referred to in *Miller v. United States*, 11 Wall., 303, where this method of entering judgment is approved.

But if the seizure is made on water, and the proceeding is in admiralty, there is some difference of opinion as to the practice to be pursued. Some authorities state that a final decree will be made on the default; others, that proofs must be made of the allegations of the libel. The 29th rule in admiralty, as prescribed by the supreme court of the United State, directs that "if the defendant shall omit or refuse to make due answer to the libel

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upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain." The method here prescribed — "proceeding to hear the cause *ex parte*" — would seem to require something more than a mere entry of a decree. Conkling in his Treatise on United States Courts, p. 568, part III, ch. 3, sec. 3, says, that in the district courts of New York, on the return day of the warrant of arrest, or some subsequent day of the term, the district attorney reads the libel or information, or so much thereof as is necessary to show what property it is that is proceeded against, by whom the seizure was made, and the grounds of seizure. He thereupon moves that the usual proclamation be made; and the crier accordingly makes one proclamation to the purport, that if any one can aught say why the property mentioned in the libel or information should not be condemned as forfeited to the United States, he may come forth and shall be heard. If no claimant appears the district attorney moves for a decree of condemnation, and that the property be sold at a designated place, and it is so ordered by the court of course, without further inquiry. Judge Betts, in speaking of decrees for default and contumacy generally, says, that "if no one appears, the proctor moves the decree of default and condemnation, and that the matter be referred to the clerk for computation, or that a *venditioni exponas* issue, if no reference is necessary." Betts' Prac., 36. In some cases, of course, it is obviously necessary to institute some inquiry to liquidate the libellant's demand. Probably different district courts had prescribed different rules on this subject before the adoption of the general admiralty rules by the supreme court, in 1844. Where the rule was (as the 29th general rule now is), that the judge should proceed and hear the cause *ex parte*, Judge Ware said, in 1839, that according to the ordinary and regular course of the court, the cause should be heard upon the evidence produced upon the part of the libellant only. *The Centurion*, 1 Ware, 495. In a case before Judge Sprague, in 1858, on a libel *in rem* for a forfeiture in which the

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phrase of the statute, "The court shall proceed to hear and determine the cause according to law," was brought directly to his attention, he held that after default there must be some hearing before a decree of forfeiture, but to what extent, must depend upon the circumstances of the case. The court, he says, will at least examine the allegations of the libel to see if they are sufficient in law, and the return of the marshal and such affidavit or affidavits as the district attorney shall submit. Where it appears that the owners have had full notice of the proceedings and ample opportunity to intervene, and have voluntarily declined to do so, slight additional evidence will be sufficient. Indeed, a willful omission by the owners to answer, and thereby make disclosure as to the material facts within their knowledge might of itself satisfy the court that a forfeiture should be decreed. But the court will require the prosecutor to introduce full proof of the allegations in the libel, whenever the circumstances shall make it reasonable." *United States v. Schooner Lion*, 1 Sprague, 400.

The result seems to be that the court must be governed by a wise discretion, whether to require proofs or not. In all cases, proclamation to appear should be made and a decree entered for default and contumacy; and then, or upon reading the libel and proceedings thereon, and either with or without further proof as the court may direct, such decree should be made as the nature of the case may require.

In the present case, being informed that the boat is a mere skiff, to which it is doubtful whether the inspection laws were meant to apply, I have deemed it advisable to hear proofs.

ON THE MERITS, *Mr. D. J. Baldwin*, U. S. Attorney, cited and relied on secs. 4399, 4400, 4426, 4437, 4443, 4446 and 4449, U. S. Rev. Stat., and the instructions of the treasury department.

THE CIRCUIT JUSTICE. This is a libel against a small pleasure boat, twenty-nine feet long, seven feet wide, and without deck, but propelled by a small steam engine with cylinder of nine inches stroke and three and a half inches diameter. It is run occasionally by its owner and the owner of the engine for their amusement, on the Buffalo bayou below Houston. In my judg-

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ment, this is not a vessel navigating the public waters of the United States, within the meaning of the steam inspection laws. Section 4426 of the revised statutes enumerates the various kinds of small steam craft which were intended to be embraced within the law. It declares that the hull and boilers of every ferry boat, canal boat, yacht, or other small craft of light character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted. And no such vessel shall be navigated without a licensed engineer and a licensed pilot.

Now the vessel in question is neither a ferry boat, canal boat nor yacht. Does it belong to the added category of "other small craft of light character?" These words must be interpreted upon the principle of *noscitur a sociis*. The last clause of the section shows that, to be within the law, a vessel must at least be one which will admit of the employment of a licensed engineer and a licensed pilot. It is not to be supposed that a mere pleasure skiff, of the kind now under consideration, was intended to be embraced within the regulations of this law.

The libel is dismissed.

The same decree will be entered for the same reason in the case of the *United States v. Steamer Bonita*.

WESTERN DISTRICT OF TEXAS.

AUSTIN, AT CHAMBERS, MAY, 1872.

PAUL S. FORBES et al. vs. THE MEMPHIS, EL PASO & PACIFIC
RAILROAD COMPANY et al.

1. A commercial or other business corporation is constituted so as to do business in a corporate name, and in a capacity totally distinct from that of any or all of its members considered as individuals.
2. Such a corporation is a person; its property is not the property of its stockholders, nor are its rights their rights.
3. The rights of a stockholder in such a corporation are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts.
4. For the invasion of these rights by the officers of the company, a stockholder may sue at law or in equity, according to the nature of the case.
5. All remedies for injuries to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name.
6. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice the interests of the corporation, a stockholder may, for such breach of trust and conspiracy, call the guilty parties to an account in a court of equity.
7. After a decree *pro confesso*, taken in a cause in equity, it is often proper for the court to inform itself through its own officers, as by the report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case.
8. Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, in behalf of themselves as well as all other stockholders, creditors or bondholders who might desire, and be entitled to intervene, and the bill charged that the officers, agents and directors of the company were squandering and embezzling its property, and the purpose of the suit was that the assets of the company might be preserved and administered, and the relief prayed was proper to be granted, and a

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decree *pro confesso* had been regularly entered, a receiver properly appointed, an authentic report of the facts made to the court, and its judgment passed thereon; individual stockholders were not permitted to intervene in the suit as defendants, and file a cross bill on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to.

9. In such a suit, in which such proceedings had been taken, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them.
10. In such a suit, rival creditors, by proceedings before the master, may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property.
11. In such a suit, persons will not be allowed to intervene as general defendants and contestants, unless they show that they have an interest in the results as stockholders or otherwise, and are also able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests.

IN EQUITY.

Heard upon motion to vacate an order allowing certain persons to intervene as defendants, and file answers and cross bills.

Mr. Courtlandt Parker, for complainants.

Messrs. Gray & Davenport, for the receiver.

BRADLEY, Circuit Justice. The bill in this case was filed against the Memphis, El Paso & Pacific Railroad Company, a corporation of Texas, by a stockholder, a bondholder and the trustees for the bondholders, under the land grant mortgages of said company, on behalf of themselves and all other stockholders, creditors and bondholders thereof, alleging various gross acts of fraudulent management and fraudulent contrivance and misrepresentation on the part of the directors, officers and agents of the company, whereby the said bondholders, mostly citizens of France, had been induced to purchase its land grant bonds to the amount of over \$5,000,000, under a representation and pledge that the money should be devoted to the construction of the road, so as to secure the grant of the lands which formed the basis of the mortgages and the only security for the payment of the bonds.

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The bill charges that the money thus procured constituted the only pecuniary means and resources of the company, and this money, instead of being used for the purpose to which it was pledged, was being utterly squandered, wasted and embezzled by the said officers and agents, with the assent and connivance of the directors, and that the bondholders, as well as the *bona fide* stockholders, were in danger of losing every cent of their money by the said fraud and embezzlement; that the company had been rendered utterly insolvent thereby, and that the lands would be entirely forfeited by nonperformance of the required conditions, and that there was no means of saving anything from the wreck for the bondholders and other creditors, unless the officers were prohibited from further meddling with the concerns of the company, and a receiver were appointed to take what property and rights remained, and either go on and construct the road, or sell the franchises and property, subject to the mortgages and debts, to some company or association that would go on and complete the work, and thus secure the benefits which formed the entire value and security of the bonds and obligations of the company. The bill prayed for an adjudication of the matters charged, for relief, and for an injunction and receiver.

If the allegations of the bill are true (and their truth seems to be strongly sustained by all the evidence which has been presented), the corporation, through its officers, directors and agents, and by means of pretended contracts, has carried on a vast scheme of fraud, by which millions of dollars have been abstracted from an unsuspecting community, reposing confidence in the character of American institutions and securities.

The interest and reputation of the country, as well as the direct injury sustained by the complainants, require that an adequate remedy, if such a remedy exists in our system of legal procedure, should be promptly and firmly applied to the case.

The bill, with the proper verifications and with due notice to the company, was presented to the court in July, 1870.

The injunction prayed for was granted, and a receiver was appointed to take charge of and administer all the assets, property and franchises of the company. The proper process being served, and no defense or appearance tendered, a decree *pro*

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confesso was entered, as of course, at the November rules, 1870.

On January 24, 1871, the receiver, by a memorial or petition duly verified by oath, reported his proceedings, and the state of facts which he found to exist, with reference to the company's affairs, fully sustaining all the allegations of the bill, and exhibiting in detail the various operations of the company, its condition and resources, the disposition that had been made of its stock, property and funds, and the liabilities which it had incurred, showing that it was hopelessly insolvent, that its property and assets, to a considerable amount, had been in part sequestered in Paris, in part attached in New York, and in part detained for duties in New Orleans; that its offices were closed, that it had done comparatively nothing towards the accomplishment of its objects, and that its operations had been entirely suspended for more than a year.

From this report it appeared, amongst other things, that prior to the late civil war, the company had surveyed a route from the eastern boundary of Texas to El Paso, and had made return of the same to the general land office of Texas, and that the commissioner of said office had officially recognized the said line, and that thereby the limits of the reservation of lands for the company's benefit had become defined; and it further appeared, that before the breaking out of the war, the company had graded about sixty-five miles of its road, and that what was done so far was by virtue of a contract with one Thomas C. Bates; it further appeared that, to secure the fulfillment of that contract on the company's part, it had, in 1860, executed bonds to the amount of \$350,000, and a trust deed or mortgage to secure the same upon all the lands and property of the company, or any lands or property that might thereafter be acquired by it; it further appeared that none of these bonds or any interest thereon had ever been paid, but that they remained on deposit in a New Orleans bank, and that Bates was engaged in litigation with the company in regard to his claims for construction or upon his contract.

This appeared to be the result of all that was done prior to the war.

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Since the war, about twenty or twenty-five miles of road had been graded, about three miles of track had been laid down, and loose rails had been dropped along the line for a few miles further. Ten locomotives, purchased in France, together with a lot of about one hundred and twenty tons of railroad iron, had been detained at New Orleans for nonpayment of duties, which, in the case of the locomotives, exceeded their value. The other railroad iron had been sold or attached in New York for claims against the company. This, from the report of the receiver, seemed to have been the whole extent of the real operations of the company in the construction of its vast work across the whole northern portion of Texas, an extent of nearly a thousand miles, and in the accomplishment of this result, or at least so much of it as had been performed since the close of the war, there had been issued forty millions of stock and about thirteen millions of bonds and land certificates.

Nothing else remained, as the result of this vast issue of securities, which the receiver could lay his hands on, except a few thousand shares of stock in the Memphis & Little Rock Railroad Company and in the San Diego & Gila Railroad Company, and a residuum of less than three hundred thousand dollars of cash assets accruing from the land grant bonds sold in France. A more utterly fraudulent concern, a more empty bubble of speculation, is rarely to be met with in this highly speculating and fraudulent age.

And yet, as appeared from the report, there are franchises and rights to grants of land belonging to the organization, which, in the hands of an honest and energetic association, backed by sufficient capital, could probably be made available to pay off most of the real indebtedness of the company, and relieve it and the country of the odium which the present concern has brought upon both. In the struggle of capitalists for the establishment of rival trans-continental lines between the Atlantic and Pacific Oceans, the franchises of this company might be rendered available to supply a valuable link in one of them.

The disposal of these franchises, and the remnants of property left, to an association organized with sufficient capital and influence to accomplish such a purpose, the receiver thought, and so

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reported to the court, was the only means left of realizing from the property and franchises of the company the slightest security or hope of meeting its just obligations. In this view of the case the court was decidedly disposed to agree with the receiver.

It is true that such an arrangement would have the effect of leaving the entire stockholding interest without anything to show for their stock; but that result, if the company was really insolvent and really a bubble company, seemed to be inevitable in any event.

The course proposed might save the claims of honest creditors, and would really be the only means of doing so, whilst it could do no real injury to the stockholders.

A disposition of the franchises and property of the company, in the manner and on the basis suggested, the receiver reported, could be made. A company had been incorporated by the legislature of Texas, in July, 1870, entitled The Southern Trans-Continental Railroad Company, the capital stock of which had been subscribed by some of the most wealthy and responsible capitalists of New York City, and which was empowered to construct a railroad on or near the route of the Memphis, El Paso & Pacific Railroad Company, and to purchase the property and rights of said company, such charter being undoubtedly obtained in view of the insolvency and failure of the latter company. The receiver reported an agreement which could be effected with said new company, which would have the effect of securing the ultimate payment of the debts and obligations of record of the defendant company. The trustees of the two land grant mortgages (all of whom except James M. Pollock, a trustee in the second mortgage, are complainants in the suit) filed a petition at the same time with the receiver, concurring generally in the plan proposed, but insisting that such proceeds of the land grant bonds as had not been dissipated and yet remained should be held by him as a trust fund or guaranty for the construction of the road, according to the solemn pledges originally given, and should not be delivered to the purchasers until that object should be accomplished and the grants of land, on the basis of which the mortgages rested, should be finally secured and rendered complete.

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The proposition thus made, after being taken under consideration by the court, and modified so as to require the purchasing company to take the property and franchises, subject to any balance which might remain due upon every valid debt of the defendant company, was approved, and the receiver was authorized to carry it out by the execution of the contracts, so modified, and the sale of the franchises and property of the defendants to the new company. Thus it will be seen that provision was made in the arrangement which was effected, for the ultimate payment of every valid debt of the company.

At this stage of the proceedings, after the passing of the last-mentioned order, and in the latter part of April, 1871, the present interveners appeared and desired to be allowed to become parties to the suit, and to intervene for their respective interests. Having, as the court thought, presented a *prima facie* case, orders were made in accordance with their request, and the order authorizing the receiver to effect the proposed sale was suspended until the interveners could formally present their case by petition or cross-bill, and be heard in reference thereto.

As soon as the counsel for the complainants and the receiver were informed of these orders for leave to intervene, they applied for a rule to show cause why such orders should not be vacated and set aside; and a rule to show cause was accordingly granted in such case.

The present argument is upon these rules to show cause, and the question to be decided is whether the applicants should have been allowed to intervene or not. The parties thus seeking to intervene are, first, James T. Sanford and John Van Nest, of New York, who allege that they are directors and stockholders of the defendant company, and they seek to intervene for the protection of their own interest and that of the other stockholders and creditors, on the ground, as alleged in their petition, that in May, 1870, the parties to the suit (except the company) entered into a conspiracy to dispose of the property of the company and convert it to their own use, and that this suit is part of the means used to effect their object, in which they have procured counsel to represent the company; that they have procured a large quantity of the company's mortgage bonds at a small price,

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which they intend to use for the same purpose; and that the receiver is in collusion with them, and acting collusively for his own interest; that the proceedings in the suit were secretly managed, and the petitioners never heard of the receiver's appointment until long after it was made.

The other parties seeking to intervene are George W. Gerrish, Rogers Fowler and Abraham Rex. Gerrish is the assignee of Thomas C. McDowell, of his share in a certain contract for constructing the company's road, which was made on the 8th of August, 1866, between the company and said McDowell, Fowler and Rex. The petitioners claim that under that contract they are entitled to a large amount of the company's stock which was transferred to and subscribed by them; that they fully performed the agreement on their part, furnished and paid the sum of fifty thousand dollars guaranty or earnest money, as therein provided, and did proceed to and did build a portion of the railroad as required, and hence became entitled to their respective interests. They therefore claim to intervene, as stockholders, for their interest involved in the suit, on the grounds, as stated in their petition, that certain leading officers of the company (who, they admit, have received and converted to their own use, immense sums of money, as stated in the bill of complaint) have fraudulently combined with the receiver to dispose of the property of the company and convert it to their own use; that the suit is employed as part of the said scheme, including the other allegations in reference thereto, made by Sanford and Van Nest, and that the proposed sale to the new company will result in irretrievable loss to the creditors and stockholders, and is intended for the personal advantage of the confederates. Neither of the petitioners questions the main allegations of the bill, unless it be the company's insolvency, but on the contrary, corroborate them.

Testimony has been taken by the respective parties.

In order properly to understand the questions thus raised, it will be necessary to examine the general character of suits and proceedings in equity against corporations in their relation to the interests of the stockholders, and the general right of the latter to intervene therein, *pro interesse suo*.

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A commercial, or other business corporation, is constituted for the specific purpose of suing and being sued, granting and receiving, buying and selling, and doing other business in a corporate name and capacity, totally distinct from that of any or all of its members considered as individuals. A corporation is a person. Its property is not the property of its stockholders. Its rights are not their rights. They have only an indirect interest therein. The rights of a stockholder are to meet at stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purpose. If the company become insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights except incidental ones, subsidiary or auxiliary to these. Of course, a stockholder has ordinarily a right to a certificate for his stock, to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law or in equity, according to the nature of the case.

But all remedies for injuries to the property or rights of the company must be prosecuted in the name of the company, and all demands against the company must be prosecuted against the company, by name, unless its officers or agents, by fraud and misrepresentation, have rendered themselves personally liable. A stockholder, in his character of stockholder, cannot sue, nor, unless specially made liable by the charter, can he be sued for any of the company's transactions. There is one case, and one only, in which he can interpose, and that is where the officers and managers of the company, by fraud and collusion with third persons, are sacrificing, or are about to sacrifice and betray the interests of the corporation. For such breach of trust and conspiracy, he can call the guilty parties to an account in a court of equity.

In the case before the court, the complainants might possibly have held the officers and agents of the company personally liable for the frauds and misrepresentations charged against them. But the said officers and agents were clothed with all the authority and power of the corporation, and negotiated and operated in its name, and issued its obligations upon its corporate credit,

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and in every official way involved and pledged its corporate liability, and being the legal representatives of the corporation, placed before the world as such by the corporation, the parties injured had a perfect right to proceed against the corporation for redress. It cannot be, and is not seriously pretended, that the principal complainants in the case, the trustees of the land grant mortgages and bondholders, are acting in collusion with the officers of the company, or that they have any other object in view than the protection and security of the bondholders, who, it is admitted, have been most outrageously defrauded out of their money.

Here, then, we have a suit brought by grossly injured parties, against the proper defendant, for relief, which, according to the view of the court, it is competent to give. The petitioners were not proper parties, and could not have been made parties without rendering the bill obnoxious to a demurrer.

It is not alleged that the complainants are colluding with the officers of the company, or that they are guilty of any improper conduct. On the contrary, the institution of the suit and its general objects appear to be approved by the petitioners. They admit all the most serious charges made by the bill.

Nor can it be pretended that the suit was not properly instituted; process was served or duly acknowledged by the president of the company. The justice who granted the original injunction and appointed the receiver declined to proceed until that officer had been personally notified of the proceedings, and had waived all objections to a hearing of the motion out of the circuit limits. Besides this personal notice and waiver, the counsel of the company, who had been recognized as such in various proceedings in other courts, appeared and made no objection to the hearing, but acquiesced therein.

Service of process and notice upon an insolvent corporation, which has ceased to carry on business, and is fast undergoing the process of disintegration, is not always an easy matter; but it is believed that not only the president, but all the principal officers of the defendant corporation were apprised of the institution of the suit, and of the proceedings thereon.

Sanford and Van Nest, who claim to be directors, allege that

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they were not made aware of them until some time after the receiver had been appointed. But it was not essential that they should be notified, and it is not pretended that it was by reason of any fault or neglect of the plaintiffs that they were not notified.

It seems to me that the suit was regularly instituted against the proper party, and that there was no collusion or fraud in the institution thereof; so far, then, as the plaintiffs are concerned, the petitioners are not entitled to intervene in the suit, or to interpose any obstacle to its termination.

The receiver appointed by the court entered upon a vigorous prosecution of his duties, took possession of all assets of the company which he could find, inquired and examined into all its transactions, and ascertained, as near as possible, the exact state of its affairs, and amount of its stock and outstanding obligations. All this was duly reported to the court in the memorial before referred to, and went to establish and confirm all the allegations of the bill which had been taken *pro confesso* against the defendant corporation in regular course. After a decree *pro confesso*, it is often proper for a court to inform itself, through its own officers, as by report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case.

The report of the receiver in this case was regarded as a proper presentation and authentication of the facts upon which to base further proceedings.

An order was thereupon made in general accordance with the receiver's recommendation, but also in accordance with the best judgment of the court. The objection of the petitioners seems to be more particularly directed against this order, whereby the receiver was authorized to dispose of the assets, property and rights of the corporation defendant, upon the terms stated in the order and the contract referred to therein.

They made charges of fraud against the receiver; they say that he is in collusion with the officers of the company who were guilty of the frauds charged in the bill, and that he is combining with them to dispose of the property of the company and convert it to his and their own use.

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The question, then, as a legal one, is reduced to this: The suit being properly instituted, the relief prayed being proper to grant, a receiver being properly appointed, a decree *pro confesso* being regularly entered, an authentic report of the facts being made to the court, and its judgment being passed thereon, can individual stockholders be now permitted to intervene in the suit and file a cross-bill in the cause on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to? It seems to me that this would be carrying the practice of intervention too far.

It is true that the complainants filed the bill in this case on behalf of themselves and of all others being stockholders, creditors or bondholders of the corporation defendant, who might desire or be entitled to intervene. But it was never contemplated, nor is it the proper practice, that the persons embraced in that category should intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. The complainants, by suing as representatives, open the door to all other parties named to come in and take the benefit of the proceedings and decree, not to oppose and nullify them. In a suit so instituted, parties may come in and prove their claims or *status*, and participate in all the dividends and benefits to be derived from the suit.

Rival creditors, by proceedings before a master, may control the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property.

To be allowed to intervene as general defendants and contestants is another and different thing. This can be admitted only upon the ground before referred to, to wit: having an interest in the results as a stockholder or otherwise, and being able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. A suggestion, in the progress of the suit, that an officer of the court is disposed to act fraudulently, or that the court has made an in-

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judicious or erroneous order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether, in any case where a suit is properly instituted against a corporation, a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be the proper mode of proceeding.

In this case, however, the complainants deny that the petitioners are stockholders of the company, and to this question much of the evidence on both sides has been directed.

An examination of this evidence convinces me that the right of the petitioners to any stock of the company is very doubtful. At all events, I see nothing in the case that should entitle them to interfere with the judicial administration of its assets for the security of its deceived and defrauded creditors.

The petitioners, if entitled to be regarded as stockholders, became such under circumstances that should have put them on their guard as to the irregularities and frauds of the company.

And it is in the discretion of the court, whether or not to permit a stockholder to become a party defendant in any case where he is not made such by the bill. And as it is held to be an extreme remedy, to be admitted by the court with hesitation and caution, I think I ought not to have allowed it in this case, and ought now to vacate the order for such allowance. "Generally speaking," says Calvert, "a stranger can take no part at all, and cannot even be heard by counsel in a claim of interest in the suit except by the consent of all parties." Calvert on Parties, 58. Deviations from the rule are occasionally allowed in order to obviate delay and expense when there is no question as to the rights of the parties; but, on the whole, I do not deem it necessary to depart from the general rule in this case, when the interests of all parties, and especially of the *bona fide* creditors of the corporation in question, are so obviously coincident with the objects of the suit and the orders and arrangements which have been made.

From a careful examination of the whole testimony, I am also satisfied that the charges of fraud and conspiracy made against

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the receiver are entirely groundless. It is unnecessary for me to examine and comment upon it in detail.

The orders for leave to intervene and file answers or cross bills will be vacated, and the sale and agreement made by the receiver will be confirmed, subject to the following modification, to wit: that no sale of the property or franchises shall be made by the said receiver to any other party or company than the said Southern Trans-Continental Railroad Company, without the approval and confirmation of this court, and subject to the same obligations to pay all valid debts of the defendant corporation which were to be assumed by said Southern Trans-Continental Railroad Company, which obligation shall be a lien on the said property and franchises for the fulfillment thereof; and the said receiver is to discontinue any actions or proceedings against the said Sanford and Van Nest for the amount of stock claimed by them.

AUSTIN, JANUARY TERM, 1874.

HAMMEKIN vs. CLAYTON.

(Before Woods and Duval, JJ.)

1. Where by the laws of a state aliens are prohibited from acquiring and holding real property, a deed made by A. to B. upon a secret trust for C. who is a foreigner, A. having no knowledge of the trust, is not void; the trust only is void.
2. By the law, of Mexico, which was in force in Texas from the 17th of March, 1836 to the 20th of January, 1840, aliens were prohibited from holding lands except by titles issuing directly from the government.
3. By the common law, an alien might hold real estate against every one and even against the government until office found.
4. The same rule prevailed in the civil law of Mexico and Texas. Therefore, when an alien to the republic of Texas took a deed not emanating from the government to lands within the territory of the republic, his title was good against all persons until after some proceeding analagous to office found by which his title was declared void.

This was an action of trespass to try titles. It had been tried

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by Duval District Judge and a jury, and came up on motion of plaintiff for new trial which was heard by Woods, Circuit Judge, and DUVAL, District Judge.

Messrs. Geo F. Moore and Charles S. West, for plaintiff.

Mr. Wm. M. Walton, for defendant.

WOODS, Circuit Judge. The case was an action of trespass to try titles, and the facts were substantially as follows:

The plaintiff claimed title under an eleven league grant made by the state of Coahuila and Texas to Emanuel Crescentia Rejon, dated November 8, 1833.

On the 11th of April, 1836, by a deed of that date executed in the city of Mexico, Rejon conveyed the land in question to one Mrs. Laguerenne. On the 27th of September, 1836, Mrs. Laguerenne executed at the city of Mexico an instrument of that date by which she declared that she held the lands in trust for the plaintiff Hammekin, and conveyed the same to him.

On the 28th of July, 1840, Mrs. Laguerenne united with her husband in a deed of that date, whereby they again conveyed the land to the plaintiff Hammekin.

The plaintiff was a native of the state of New York, and immigrated to the republic of Mexico in 1831, and became domiciled in the city of Mexico where he remained until 1836. In April, of that year, he purchased the land in question and paid for it 3,000 silver dollars. The deed, therefore, was made to Mrs. Laguerenne who was a native of Mexico and had never resided out of that country. The deed was made to her in trust for the plaintiff, and the reason why it was not made directly to the plaintiff was that the law of the republic of Mexico as the parties supposed, prohibited a foreigner from holding real estate situate in the republic. On March 2, 1836, the independence of the republic of Texas was declared, and on the 17th of the same month, the constitution of the Texan republic was adopted. These facts were at the time of the execution of the deed to Mrs. Laguerenne unknown to her and to Hammekin.

In April, 1836, after the conveyance to Mrs. Laguerenne, the plaintiff took from her a power of attorney to sell the land, and started for Texas. He was shipwrecked and did not reach his

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destination until June, 1836, at which date he became a citizen of the republic of Texas, and continued to reside in Texas as a citizen until 1845. In 1838, he paid the land dues on the lands. In 1845, he left Texas and again became a citizen of the United States, and so continued until the commencement of this suit, being at the latter date a citizen of New York. In 1838, Mr. and Mrs. Laguerenne removed to and resided in New Orleans, and while there, executed the deed to plaintiff, dated July 28, 1840. In 1840 or 1841, they returned to the city of Mexico, where Mr. Laguerenne died, and where Mrs. Laguerenne, who is still living, resides.

The defendant was in possession of the land in controversy at the commencement of the suit, but showed no title whatever.

The constitution of the republic of Texas, sec. 10, General Provisions (Paschal's Dig., vol. 1, p. 37), declares: "No alien shall hold land in Texas except by titles emanating directly from the government of this republic."

Upon this state of facts, the court instructed the jury that the deed from Rejon to Mrs. Laguerenne of April 11, 1836, was absolutely void, and conveyed no title to the grantee. In pursuance of this instruction, the jury returned a verdict for defendant.

The motion for new trial is based on the alleged error of the court in giving such instruction to the jury.

The defendant insists that the instruction was correct, and that the deed was void upon two grounds:

1. Because it was made with the purpose to evade the laws of the state of which Mrs. Laguerenne was a citizen, and where the plaintiff was domiciled; and
2. Because, at the date of the deed, the republic of Texas, within which the land was situated, had declared its independence and adopted a constitution, and both the constitution and laws of Texas forbid that an alien should hold lands except by titles emanating directly from the government of the republic.

We will notice these two points in their order.

It is claimed by the plaintiff that the law of Mexico at the date of the deed in question did not absolutely prohibit all foreigners from acquiring and holding real estate in Mexico, and to

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sustain this view, he cites the 6th, 9th and 10th sections of the decree of March 12, 1828, found on page 649 of Schmidt's Civil Law of Spain and Mexico.

In the view we take of the case, it is unnecessary to decide this question. Conceding that the law of Mexico was as claimed by defendant, we think it does not follow that the deed to Mrs. Laguerenne was void. There is no evidence in the case that Rejon, the grantor, knew that the deed was in trust for Hammekin. We think that the deed operated to convey the title out of Rejon, and that the most that could be claimed was that the trust was void. *Hubbard v. Goodwin*, 3 Leigh, 492.

The main question in the case is the second, namely, Was the deed in question by the constitution and laws of the republic of Texas absolutely void, so as to convey no title to Hammekin?

Between the 17th of March, 1836, and the 20th of January, 1840, the laws of Mexico, unless where modified by the constitution and statutes of the republic of Texas, were in force in Texas. *Barrett v. Kelly*, 31 Tex., 481; *Hanrick v. Barton*, 16 Wall., 166.

It becomes important, therefore, to determine whether by the Mexican law the deed of Rejon was void and conveyed no title. Upon this point the decided weight of authority is, in our opinion, with the negative of this proposition.

The rule of the common law is well settled that an alien may hold real estate against every one, and even against the government, until office found. 1 Com. Dig., tit. Alien C., 2; *Craig v. Leslie*, 3 Wheat., 589; *Bradstreet v. Supervisors of Oneida County*, 13 Wend., 546.

That this is the rule of the civil law of Mexico is shown by the following authorities: Escreche Partidos Hispano Mexicanos, vol. 2, 696; Sala Mexicano, vol. 2, 240; *Ramires v. Kent*, 2 Cal., 558; *The People v. Folsom*, 5 id., 378; *Merle v. Mathews*, 26 id., 478.

In the last cited case the court says: "At common law, a conveyance of land to an alien was a cause of forfeiture to the crown of such lands, not only on account of the alien's incapacity to hold them, but likewise on account of his presumption in attempting by an act of his own to acquire real property (2 Black.

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Com., 274), but notwithstanding, until office found, the title remained in him. So far as we are advised, the consequences that might follow this species of infraction of the law were substantially the same under the Mexican law as at common law, and until denouncement, the alien grantee of land could hold and possess it as his own property."

So in *Racouillat v. Sansevain*, 32 Cal., 386, the court declares that "the question as to the right of a nonresident alien to hold property at common law, and as we understand it under the civil law, was a matter between the alien and the government, and could not be called in question in a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased is by an inquest of office, and until office found, an alien may hold real estate. Under the civil law, there was some analogous proceeding."

In *Osterman v. Baldwin*, 6 Wall., 121, the facts run almost on all fours with the case at bar. In 1839, prior to the admission of Texas into the union, Baldwin, a citizen of New York and an alien to Texas, bought and paid for some lots in the city of Galveston. It was objected to Baldwin's title, that when his purchase was made, Texas was a foreign country, with a constitution forbidding aliens to hold real estate. The supreme court held that "the defendants could not object on that ground; that until office found, Baldwin was competent to hold land against third persons; no one has any right to complain in a collateral proceeding if the sovereign does not enforce his prerogative."

But it is insisted, that the supreme court of Texas has settled the law otherwise, and that this court should follow the courts of Texas which have established the contrary doctrine as a rule of property in the state.

We are cited to the cases of *Holliman v. Peebles*, 1 Tex., 673; *Yates v. Iams*, 10 id., 168; *Clay v. Clay*, 26 id., 24; *La Coste v. Odam*, 26 id., 458, and other cases, to show that the ruling of the supreme court of the state has been, that a deed of lands to an alien, under the laws of the republic of Mexico, was absolutely void, and conveyed no title.

We should feel bound to follow these decisions of the su-

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preme court of Texas, had they not been unsettled by later adjudications.

The case of *Barrett v. Kelly*, 31 Tex., 476, is subsequent in date to all the cases cited to show the invalidity of the deed of Rejon, and is entirely inconsistent with those cases; and, though not in words, yet in effect it overrules them.

The facts in that case were, that Wharton, a citizen of Mexico, on the 13th of April, 1833, executed a conveyance for lands in Texas to J. and W. D. Barrett, who were aliens, and the point was distinctly made in the case, that the alienage of the Barretts gave Kelly, who claimed under a junior grant, the better title. But the court sustained the Barrett title and took the same view of the Mexican law as was taken by the supreme court of California in the cases above cited. The learned judge, who delivered the opinion, says: "From 1833 to 1840, the defendants (the Barretts) were liable to have their land divested from them by due process of law, according to the laws of Mexico. There is no allegation that any court or political authority ever adjudicated upon the alienage of defendants, while they were such, and there can be as little question, that without some process of this kind the rights of the parties to the land were never divested." pp. 481, 482.

These remarks of the court and its action in the case are entirely inconsistent with the doctrine in *Clay v. Clay*, *supra*, that the deed to the Barretts was absolutely void, and conveyed no title.

In the case of *Settegast v. Schrimpf*, 35 Tex., 341, the supreme court of the state appear to cite with approbation the case of *Osterman v. Baldwin*, 6 Wall., *supra*.

We are of opinion, therefore, that the later and better view of the supreme court of this state is, that under the Mexican law a deed to an alien was not void, but conveyed an estate subject to be divested upon a proceeding by the government for that purpose.

Our conclusion is, therefore, that a new trial should be granted on account of the error of the court in instructing the jury that the deed from Rejon to Mrs. Laguerenne was void and conveyed no title.

DUVAL, District Judge, concurred.

The State of Texas vs. Gaines.

AUSTIN, JUNE TERM, 1874.

THE STATE OF TEXAS VS. GAINES.

(Before BRADLEY and DUVAL, J. J.)

The fact, that by reason of local prejudice against his race and color, a person of African descent cannot have a fair trial in the state courts, is not a ground under the civil rights act for removing a criminal prosecution against such person, from the state to the federal court.

This was an indictment for bigamy in the district court of La Fayette county. The defendant, a colored person of African descent, applied for a removal of the case into the district court of the United States, under the civil rights act of April 9, 1866 (14 Stat., 27; Rev. Stat., sec. 641), on the ground, that by reason of his race and color, and his republican politics, he could not have as full and equal protection and benefit of the laws of Texas in any of the courts thereof, nor of proceedings thereunder, for the security of person, as is enjoyed by white citizens; and that the public prejudice against him, for the causes aforesaid, was so great, that it would be impossible for him to obtain a fair and impartial trial in any of said courts. The state district court refused the application, and proceeded with the case. The defendant, being found guilty, appealed to the supreme court, which reversed the judgment, and directed the inferior court to remove the case as prayed. It was removed accordingly, and being by the United States district court remitted to this court, the defendant moved to quash the indictment, and the district attorney of the United States, at the same time, moved to dismiss the case from this court for want of jurisdiction.

Mr. J. R. Burns, for Gaines.

Mr. A. J. Evans, U. S. Attorney, for the motion to dismiss.

BRADLEY, Circuit Justice. I will consider the last motion first. The first section of the civil rights act (14 Stat. 27) declares, that citizens of every race and color shall have the same right, in every state, to make contracts, sue, give evidence,

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inherit, purchase and hold property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishments and none other, any law, statute or custom to the contrary notwithstanding.

The second section makes criminal and imposes penalties on any attempt to deprive any citizen of these rights, or to different punishments on account of his having at any time been held in a condition of slavery.

The third section gives to the district courts of the United States cognizance of all crimes and offenses under the act; and also, concurrently with the circuit courts of the United States, cognizance of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section; and if any suit or prosecution, civil or criminal, has been commenced in any state court against any such person for any cause whatsoever, such defendant shall have the right to remove such cause for trial to the proper district or circuit court, in the manner prescribed by the "Act relating to *habeas corpus*," etc., approved March 3, 1863, and its amendments.

The act of March 3, 1863 (12 Stat., 755), to which reference is made, authorizes the removal to the courts of the United States of suits and prosecutions commenced in a state court, against officers or others acting under authority of the United States, and, to effect such a removal, authorizes the party sued "to file a petition, stating the facts, and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending," etc. Thus, the statement on oath by the party himself is all the verification of the facts which the law required for effecting the removal.

The question is, whether local prejudice against a colored person, by reason of his race and color, alleged to be so great that he cannot have a fair trial in the state courts, is good ground, under the civil rights act, for removing a criminal action against him from the state court into the district court of the United States. Is it a cause for removal within the act?

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It is clear that in order to entitle to a removal of the cause the case must show the deprivation of a right guarantied by the first section of the act. The defendant says that he is deprived of such a right, and that the right of which he is thus deprived is, "full and equal benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens." But how does he say he is deprived of that right? Not by the laws themselves, but by the prejudice and enmity of the people. Is that sufficient? What says the third section? How does it describe and define those who are within the meaning of the act? It defines them as "persons who are denied, or cannot enforce in the courts or judicial tribunals of the state or locality where they may be, any of the rights secured to them by the first section of this act." Here are two classes:

1. Persons who are denied any of the rights secured to them by the first section of the act.

2. Persons who cannot enforce in the courts any of said rights.

Does the denial of rights or the inability to enforce them in the courts refer to a denial by the laws, usages and customs of the state, and to an inability to enforce rights in the courts in consequence of inadequate remedies to that end; or does it refer as well to other obstructions of right, such as personal or class prejudice, or political feeling and the like?

It must be remembered that the privilege of removal is thus guarantied to every citizen of the United States, as well white as black. And if every citizen who is prosecuted in a state court can, on his own allegation, remove his case to the United States courts, it will present a powerful temptation to litigants, especially of the criminal class, and the United States courts will be flooded with cases, in which one of the parties imagines, or says, that he cannot have a fair trial in the state courts. We cannot think that this is the true construction of the statute.

Besides, if it were, it might be open to very grave question whether it would be constitutional. The civil rights act has been reenacted since the adoption of the fourteenth amendment. An examination of that amendment might be necessary in order to ascertain whether any interference with the equal rights of the citizen is guarantied, otherwise than as against state interfer-

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ence, and the operation of partial and unjust state laws. This, however, is rendered unnecessary from the view we have taken of the true construction of the civil rights act. We think it is intended to protect against legal disabilities and legal impediments to the free exercise of the rights secured, and not to private infringements of those rights by prejudice or otherwise, when the laws themselves are impartial and sufficient.

The case must be remanded to the state court.

DUVAL, District Judge, concurring. The purpose and object of the civil rights bill was a most laudable one. It was to secure to the newly enfranchised black race the same rights and privileges, civil and political, as were enjoyed by the whites. The first section of that act enumerates those rights. It provides that the colored race shall have the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey, real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding."

From a careful consideration of the act in question, my opinion is that no cause, civil or criminal, to which a black man is a party pending in a state court, can be properly removed into a court of the United States unless it affects the exercise and enjoyment of some one of the rights specified in the above section. I cannot think it was the intention of congress, by any provision in said act contained, to discriminate in favor of the black race as against the white, but simply to secure them in the same rights, civil and political, that the white race enjoyed. Both were to be left subject "to like punishment, pains and penalties, and to none other," for violation of the criminal laws of the state. In other words, their rights and responsibilities, civil and criminal, were to be identically the same.

In this case, the defendant has been indicted under the laws of the state of Texas, for the crime of bigamy and convicted thereof. The case has been transferred to this court by order of the

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supreme court of the state, simply upon the sworn statement of the defendant that, owing to a hostile public sentiment and prejudice against him, he cannot obtain justice.

In my judgment, the civil rights bill does not authorize the transfer. It is not such a case as the act contemplates and is not embraced in its provisions.

TYLER, APRIL TERM, 1876.

PATIENCE GOHEN VS. THE TEXAS PACIFIC RAILWAY COMPANY.

1. The act of the legislature of Texas, of February 2, 1860, which gave a right of action for damages to the surviving husband, wife, child, children, or parents of any person whose life was lost by the negligence or carelessness of the proprietors, etc., of any railroad, steamboat, etc., entitled the plaintiff to recover compensatory damages only.
2. Said act is not abrogated by section 30 of the constitution of Texas of 1869, which makes "every person, corporation, etc., that may commit a homicide through willful act or omission, responsible in exemplary damages to the surviving husband, widow, heirs, of his or her body, or such of them as there may be, separately and consecutively."

Heard on special exceptions to the plaintiff's petition.

The plaintiff, a citizen of the state of New York, and mother and sole surviving parent of Edward L. Gohen, brought suit against the Texas Pacific Railway Company, to recover damages resulting from the death of her son, who was employed as a fireman by the said company, and was accidentally killed while so employed, through the alleged fault and negligence of the company.

The question raised by the exceptions was the right of the plaintiff to sue.

Messrs. W. S. Herndon and George Hill, for plaintiffs.

Messrs. William Stedman and F. B. Sexton, for defendant.

DUVAL, District Judge. By an act of the Texas legislature,

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passed February 2, 1860, it is provided: "If the life of any person is lost by reason of the negligence or carelessness of the proprietor or proprietors, owner, charterer, or hirer of any railroad, steamboat, * * and the act, neglect, unskillfulness or default is such as would (if death had not ensued) have entitled the party injured to maintain an action for such injury, then, and in every such case, the person who would have been liable, if death had not ensued, shall be liable to an action for damages. * * Every such action shall be for the sole and exclusive benefit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any one of them. * * And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death," etc.

By section 30 of the constitution of the state of Texas of 1869, it is provided: "Every person, corporation, or company, that may commit a homicide, through willful act or omission, shall be responsible in exemplary damages to the surviving husband, widow, heirs of his or her body or such of them as there may be, separately and consecutively, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

It is contended by the defendant that this constitutional enactment repeals the law of 1860, so far at least as the latter gave to a parent a right of action for the death of his or her child, and this position has been ably maintained by counsel.

It is admitted that no right of action, in such a case as this, existed at common law, which is unquestionably true, and that if it can be maintained at all, it must be by virtue of the act of 1860. There is no express repeal of this act. If repealed, it must be so by necessary implication; or, rather, as was held by the supreme court of the United States in *Davies v. Fairbairn*, 3 How., 636, by a "positive repugnancy existing between the provisions of the new law and that of the old." The question is, Does such positive repugnancy exist in this case? Does it follow, because the right of action, which is given to a parent by the act of 1860, is left out and not provided for by the constitu-

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intestate commenced this suit against Brown, Hancock and West for mesne profits. Hancock and West pleaded that they acted only as attorneys and were not amenable to an action, not being in possession in fact, and not having received the rents and profits.

Mr. A. M. Jackson, for plaintiff.

Mr. C. S. West, for defendants.

BRADLEY, Circuit Justice, charged the jury as follows:

The first question to be considered is the liability of the defendants. There is no question as to the liability of Brown. It is contended by Hancock and West, however, that they have had no possession or use of the property, but that all they have had to do in relation to it has been in their professional capacity as attorneys-at-law, representing Connett originally, and subsequently Brown as his grantee.

It is a general rule that attorneys-at-law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients. The public interest demands this. If attorneys cannot act and advise freely and without constant fear of being harrassed by suits and actions at law, parties could not obtain their legal rights. If not free to advise and defend those who seek their aid, the laws are made in vain. Injustice and oppression would rule high-handed in the land. The untrammelled freedom and zeal, no less than the learning, and ability of the members of the legal profession, are necessary to make them what they really are—the great body-guard of men's rights in society. It is as necessary to the public weal that they should be privileged from molestation by actions and suits in the courageous performance of their duty as it is that the representatives of the people in the legislature or the judges of the courts should be thus privileged. *Hastings v. Lusk*, 22 Wend., 410; *Hodgson v. Scarlett*, 1 Barn. & Ald., 232; *Wright v. State*, 13 Ga., 383; *Hunt v. Printup*, 28 id., 297; *Wigg v. Simonton*, 12 Rich. (S. C.), 583; *Hargrave v. Le Breton*, 4 Burr., 2422.

Unless, therefore, Hancock and West went beyond the line of their duty as attorneys for Connett, who was a resident of Mis-

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souri and unable to attend personally to his interests here, they are not liable in this action. The mode in which their compensation was provided for does not affect the question. Whether their fee was to be contingent on success or certain in amount makes no difference.

Did they go outside of the line of their duty as attorneys? In this country the office of attorney includes that which is known in England as a solicitor, and his duties are not confined to acts done in the office or the court room, but extend to all those acts which are necessary to be done in the conduct of the litigation or legal business or transaction with which he is charged; for example, the making and serving of notices; the direction of officers of the law in the performance of their official acts; the supervision and direction of formal or judicial transfers of possession; the making of demands when necessary to be made; the collection of moneys; the making and delivery of leases; the examination of titles of an estate; the effecting of a sale or a purchase, and the general supervision of a business transaction which requires the superintendence of a person skilled in the laws. Where possession of an estate has been delivered by legal forms, under the direction of an attorney, or formally delivered to him in behalf of his principal; the retaining of possession afterwards by the principal, or by a person whom the attorney places in possession for him, does not make the attorney responsible for the acts of such person while in possession, unless, indeed, he conceals his principal and assumes the character of principal himself.

The next question to be considered is the amount of damages. The ordinary rule for the measure of damages in actions of this sort, is the fair rental value of the property, as the plaintiff's counsel has contended. If this cannot be ascertained, the next best rule is the actual value of the use of the property under prudent management. I do not remember any evidence in the case which showed any rental value. It does not appear that this property, or any similar to it in the neighborhood, had been let at a pecuniary rent, or, if it had, what the amount of the rent was. We can not tell, therefore, precisely what its rental value was. The plaintiff has given evidence of estimates made

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by witnesses of what they considered the property to be annually worth, based on their calculation of what could be actually made from it. But whether any person would have undertaken to pay a rent for it equal to the amount named by these witnesses may be a question. There are always risks attending the use of such a property and the demand for its products, which more or less affect the rent which parties are willing to give. And, then, no one is willing to give, in rent, all he expects to make from the property. What the defendant did actually make, we have some evidence to show from the testimony of Brown himself, and this will have considerable weight in establishing the value of the use during the period of his possession. What he actually did make, however, is not the measure of the plaintiff's right of recovery. This is not an action for an account of what he actually received; but for what the plaintiff might have received from a prudent use or renting of the property, had he not been deprived of its possession. The defendant may have had bad luck, or he may not have managed prudently. The plaintiff ought not to be saddled with his bad luck, or his unskillful or imprudent management. If the fair rental value can not be ascertained, you must ascertain as near as you can from the evidence, and give to the plaintiff the fair actual value of the property during the period it was in the possession of the defendant, if prudently and judiciously managed.

In making this estimate, you will make allowance for destruction caused by uncontrollable floods, which would necessarily have affected the value of the property had it been in the possession of the plaintiff himself. There can be no legal or actual perception of profits annihilated by the overwhelming powers of nature. Of course, you will consider the several parts of the property, the cultivated part and the timbered part, and the buildings and machinery in connection therewith; and will make due estimate of the value of the timber which was cut as it stood on the ground. I do not know that I can aid you in making this estimate. You have heard all the evidence, and you will give it the weight which it deserves.

Some question has been made whether the timber cut for Brown's upper mill was cut before or after the commencement

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of the suit. If cut before, it will be included in the estimate; if cut since, it will not be. I have no note of what the evidence was on this subject. You will have to depend upon your own recollection of it.

As to the claim for improvements placed on the property by the defendant, it is my duty to instruct you that he is not entitled to any allowance therefor. He took possession of the property whilst it was in litigation, and that precludes him. The law of Texas is, that if a person acquires and holds possession of land in good faith, believing it to be his own or to belong to the person of whom he holds it, he is entitled to be paid for the permanent and valuable improvements made by him thereon, though his title proves to be invalid. But after the party having the better title makes a judicial demand by bringing suit to recover the property, the person in possession, or any one taking possession under the same title during the pendency of the suit, can no longer set up the plea of good faith. After this he acts at his peril. The true owner, having done all he can do to get possession of his own, even to the point of resorting to the courts of justice, can no longer be charged with improvements over which he has no control, and which the unlawful possessor chooses to make. A wealthy possessor might, otherwise, ruin the owner by making costly improvements which the latter does not want, and has no means to pay for. The possessor cannot even be allowed for renewal of fences, or rebuilding of houses, or replacement of machinery. He does it all at his own risk. Hard cases may, undoubtedly, arise under this rule. But hard cases can not control the law. No doubt the defendant Brown did suppose he had a good title, and no doubt his counsel, Hancock and West, honestly so advised him. But legal good faith cannot be averred where the real owner has already commenced his action for the recovery of the property.

Morris, Assignee, vs. Brush's Executors.

JAMES B. MORRIS, ASSIGNEE OF PHILIP DEI et al., vs. THE EXECUTORS OF S. B. BRUSH.

1. A proceeding in the district court in the nature of a suit in equity, brought by the assignee and creditors of a bankrupt to set aside the claim of an alleged creditor, and to abrogate the lien asserted by him on the bankrupt's property, is appealable to the circuit court under section 4980 of the revised statutes.
2. A compliance with general order in bankruptcy XXVI, in relation to the time of filing such appeal in the circuit court, is not necessary, to give the court jurisdiction.
3. But the order mentioned is a rule of practice in the circuit court, and if disregarded, the appellee has *prima facie* ground on which to move to dismiss the appeal.
4. A transcript of the proceedings of the district court is not required to be filed within the ten days prescribed for filing the appeal in the circuit court, but only a statement of appellant's claim and a brief account of what has been done in the district court and the grounds of appeal.
5. Where the decree of the district court disallowing a claim against a bankrupt estate was entered on January 21st, notice of appeal given January 27th, and the appeal bond filed in the clerk's office of the district court on January 28th; and before the next term of the circuit court, but not until May 22d, the declaration of appellant, setting forth his claim and the history of the proceedings was filed in the circuit court, at which time a transcript of the proceedings in the district court, was also filed, *held* that the circuit court had jurisdiction of the case and could hear it or not in its discretion, according as it might or might not be satisfied with the excuse offered for the delay in filing the papers.
6. A district judge sitting in the circuit court may in a proper case enlarge the time for filing an appeal in the circuit court.

This cause was heard upon the motion of plaintiffs, the appellees, to dismiss the appeal.

Messrs. Wm. M. Walton and James B. Morris, for the motion.

Messrs. C. S. West and W. F. North, contra, who cited and relied on sections 4981-4984, U. S. Rev. Stat.; Bump. on Bankruptcy, 8th ed., 345; *Baldwin v. Rapplee*, 5 Bankrupt Reg., 19.

BRADLEY, Circuit Justice. The nature of this proceeding was that of a suit in equity, brought by the assignee and creditors to set aside the claim of Brush and to abrogate the lien claimed

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by him on the bankrupt's property. In such a case an appeal clearly lies under sec. 4980 of the revised statutes.

The motion now made is to set aside and dismiss the appeal, on the ground that the appeal was not filed in the clerk's office of this court within the ten days after taking the appeal in the district court as required by the general order in bankruptcy XXVI. It is not disputed that the appeal was claimed and notice thereof given to the clerk of the district court, and to the assignee and creditors, within ten days after the entry of the decree, and that a bond was duly filed as required by sec. 4981 of the revised statutes. Nor is it disputed that the appeal was duly entered at the next term of this court, which was held after the appeal was taken, as required by sec. 4982 of the revised statutes. The facts are, that the decree was entered on the 21st of January, 1875, and notice of appeal taken on the 27th of January, and the appeal and bond were filed in the clerk's office of the district court on the 28th of the same month; but the declaration of the appellant, setting forth his claim and the history of the proceedings, was not filed in this court until the 22d of May, 1875, at which time the same was filed, together with a transcript of the proceedings before the district court, consisting of nearly two hundred pages. The next term of the circuit court was held on the first Monday of June, 1875, and after that, on the first Monday of January, 1876; but neither the circuit justice nor the circuit judge was present in the district from the time of taking the appeal until the present term, June, 1876.

The excuse offered by the appellant's counsel for not filing the appeal in this court until the 22d of May, 1875 is, that the proceedings were so voluminous that they could not obtain a transcript thereof at an earlier day; that they deemed the transcript a necessary part of the appeal; that no delay was occasioned in the progress of the case by their failure to file the appeal in January; and that the practice in this respect is uncertain. I think it clear that a compliance with general order XXVI, in relation to the time of filing the appeal in the circuit court, is not necessary to give this court jurisdiction. This was so held by Circuit Judge WOODRUFF in the case of *Baldwin v. Rappee*, 5 B. R., 19. He considered the rule merely

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directory. As all the requirements of the statute were complied with in this case, the court has jurisdiction of the appeal, and can hear it or not in its discretion, according as it may or may not be satisfied with the excuse that has been offered for the delay. Although the rule is directory, merely, still it is the rule which governs the practice of this court, and if disregarded, the appellee has a *prima facie* ground of dismissal. And I think the counsel for the appellants is in error in supposing that the transcript of the proceedings in the district court is required to be filed within the ten days prescribed for filing the appeal in this court. It is not always in the appellant's power to compel an instant making out of the transcript. He may have to get orders from the circuit court as to what shall be certified, although it is the duty of the clerk of the district court to make it out with all convenient dispatch, when the proper conditions are complied with. What is required to be filed in the circuit court within ten days from the time of taking the appeal is the appeal, containing a statement of the appellant's claim, and a brief account of what has been done in the district court, and the ground of appeal. This is what is meant by the declaration in sec. 4984 of the revised statutes. This, in most cases, can easily be done within the ten days. But there has undoubtedly been some uncertainty in the practice. And, in view of this fact, and the fact that no injury could possibly arise from the delay in this case, as the court did not sit till June, and as there was no judge here who could hear the case; and as the delay does not seem to have proceeded from any desire to prolong the proceedings, I shall deny the motion to dismiss.

It is proper to observe, in conclusion, that I see no reason why the district judge, as judge of the circuit court, should not, in a proper case, enlarge the time for filing the appeal in the circuit court. This would be the better mode, when the parties are apprehensive that they will not have time sufficient to prepare the proper pleadings, as it would prevent applications to dismiss, and would restrain the attention of the parties to the merits.

SOUTHERN DISTRICT OF GEORGIA.

APRIL TERM, 1873.

WILLIAM MCKENZIE et al. vs. G. W. ANDERSON, Ex'r.

1. Where a trustee and executor, in entire disregard of the directions of the will, takes funds of the estate and treats himself as the borrower, he must be charged with the highest amount of interest allowed by the law. He is personally and absolutely responsible for the fund.
2. Mode of adjustment of accounts of executor and trustee, in case of maladministration.
3. For such public and national calamities as war, foreign or civil, and the vicissitudes of fortune which attend them, no individual, who does not incite them, is responsible.
4. An executor is not responsible for the loss of the funds received by him for dividends in confederate money or notes, which, at the time, he was obliged to accept.

This was a bill filed by the legatees of William J. Scott, residing in Great Britain, against Anderson, the executor, for an account, and for a change of trustee.

William J. Scott, a resident of Savannah, Georgia, was possessed of a considerable real and personal estate in said city, and made his will, dated October 6, 1823, and a codicil thereto, dated June 4, 1829, by which, after constituting the defendant and others as executors and trustees, he devised and bequeathed to them all his estate in trust: First, to convert the same into money unless invested in good mortgages or government funds, and with the proceeds to pay his debts and funeral expenses; secondly, to invest the residue in the public stock or funds of Great Britain, the United States, or any individual states, or any municipal corporation, or in the capital stock or shares of any chartered bank, or upon real estate, as they might in their discretion think proper; thirdly, fourthly, etc., to pay one-half

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the income and profits of said estate to his daughter Elizabeth (one of the complainants, wife of William McKenzie), during her life; and after her death, the said half of his estate to such child or children of either of his daughters, or their issue, as his daughter Elizabeth should by will appoint; and to pay the other half of said income and profits to his daughter Kezia now deceased, the mother of the other complainants, for her life; and after her decease, to pay the said half of his estate to such child or children of either of his daughters as his daughter Kezia should by will appoint; and if either daughter should die intestate, then to pay and divide her moiety to and among her children and their issue, if any, share and share alike. The testator further empowered his executors to call in any debts or securities which to them might appear unsafe or insecurely invested, and to invest the same or the proceeds thereof according to the directions before given.

The testator died in 1830, and the defendant proved the will on the 3d day of November in that year, and took possession of the estate, amounting, as stated by the bill, in real estate, to the value of \$24,000, and in personal estate to \$48,323.20. The bill further stated the marriage of the daughters, Elizabeth, to William McKenzie, and Kezia, to Richard R. Manson; and the death of Kezia intestate, leaving her surviving the complainants, Richard R. Manson and Elizabeth R. Gordon, there being then no other children of either of said daughters of the testator, nor any children's children.

The bill charges that large sums of money came into the executor's hands, which he failed to invest as directed by the will, but applied the same to his own use; that he has failed to pay over the interest as directed; that he invested large sums in Confederate States bonds, which he had no right to do; that he continued to keep a large amount invested in the stock of a banking corporation, to-wit: The Planters Bank, of Georgia, of which he was president, the assets of which were used for the benefit of the Confederate States government, whilst it was his duty to have changed said investment; and the failure to do so resulted in a great loss to the estate; that he kept large balances in his hands which he might have invested, and so lost the interest

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thereof, and then invested the same in confederate bonds, which became worthless. Other delinquencies are charged which it is not necessary to specify.

The answer stated that the real estate sold for only \$21,000, and that the personal estate was appraised at \$45,895, a copy of the inventory being annexed to the answer. The answer further stated that of this amount, the sum of \$3,497.96 was decreed to be the property of the two children and was paid over to them, and that certain other items did not produce the amount of the appraisement. The defendant appended to his answer a copy of his whole account from 1830, down to the time of filing the bill, and this account furnished the materials from which, with the aid of some further extraneous evidence, a satisfactory disposition of this case could be made. He admitted, and his accounts and testimony showed, that he received large amounts of money belonging to the *corpus* of the estate, arising from the sale of lands and other sources, which he loaned out on personal security, without investing the same as directed by the will. But he contended that he paid over the interest thereof, and that they were loaned out at greater profit in that way, than they could have been in any other manner. He admitted that on the 9th day of June, 1863, he invested the sum of \$23,000 in Confederate States bonds, and on the 15th of January, 1864, the further sum of \$1,010 in like securities; that this was money received by him in confederate treasury notes for loans then due, part of the *corpus* of the estate, which he was authorized to receive in this form by a statute of Georgia; and that the purchase of the bonds was sanctioned by an order of the superior court of Chatham county, Georgia, made in May term, 1863; and that he still held the said bonds. He further stated that from and after the year 1861, all the rents, issues and income of the estate were received in confederate treasury notes—a part of which were in his hands. He further stated that from 1864 to 1866 there was no income which came to his hands, and only a few hundred dollars thereafter, of which he gave a detailed statement. He admitted that he invested largely, to the extent of 244 shares, in the Planters Bank of Georgia, of which he was president, and could not, in his judgment, have made a better investment. He ad-

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mitted that said bank made large loans to the Confederate States of America, of which he gave a list; but said that it was forced to do so by law and public opinion. He denied that the failure of the bank was due to these loans; but insisted that it was caused by the statute of Georgia which compelled the bank to receive the treasury notes of Georgia and the Confederate States in payment of all dues to the bank. By an amended answer he said that the confederate bonds purchased by him were not purchased from the government, but from private individuals in the market.

Upon this bill and answer the matter was referred to a master, who made a long report, to which both parties excepted; and it was upon these exceptions that the case was heard.

Mr. H. R. Jackson, for complainants.

Messrs. T. E. Lloyd and W. S. Chisholm, for defendants.

BRADLEY, Circuit Justice. It appears from the master's report and from the defendant's accounts and evidence, that the \$23,000 invested in Confederate States bonds was a sum of money, part of the *corpus* of the estate which had accumulated in the defendant's hands many years before, as far back as 1840, and had been accumulating several years before that time, and which he had never invested in accordance with the directions of the will; but which, he alleges, he loaned out from time to time to individuals on their personal security, and which was all paid in confederate treasury notes in 1863.

It further appears that the balance of the estate had been invested by the defendant in bank stock of the Savannah Bank, including a few shares of railroad stock; that these investments commenced soon after the commencement of the trust, and were continued from time to time as funds came into his hands from the sale of lands and other sources. In 1840, these investments stood as follows: bank stocks and railroad stocks whose par value was \$47,400, and which had cost the trust fund the sum of \$44,958. These investments remained unchanged down to the time of filing the bill in this case. In 1848, on occasion of receiving an extra dividend of \$1,600 from the Marine Bank, the amount was invested in thirty-two additional shares in said bank.

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One complaint made by the complainants is, that these investments should have been changed when the civil war rendered them precarious. With the exception of the railroad stock, they are now a total wreck and loss. The \$23,000 was an additional amount which the executor retained in his hands, and which he alleges that he loaned out on personal security as before mentioned. His accounts contain annual credits of interest for moneys loaned, which he says were the moneys in question. These credits are always in a single sum, and from the year 1848 down to the period of the war, they were invariably the sum of \$1,489.25. From 1842 to 1847 inclusive, they were \$1,540. Prior to 1842, they were for less sums according to the amount which the defendant contends was thus lent out on personal security. These several sums prior to 1848 were just the amount of 7 per cent. on certain round sums of principal.

Now with regard to this account, the complainants contend:

1. That the defendant never gave credit for interest on the full amount remaining in his hands.
2. That, instead of simple interest, he ought to be charged with compound interest on the amounts actually remaining, or that ought to be, in his hands, because, as they contend, he used this money himself, and is guilty of gross misconduct and breach of trust in not investing it pursuant to the directions of the will.
3. That he ought to be charged with eight per cent. instead of seven per cent. up to 1846.

But the accounts further show that in addition to the standing sum of \$23,000, for which the executor allowed annual interest, an additional amount gradually accumulated in his hands over and above his remittances to the legatees.

These accumulations increased from \$22.52, in 1843, to \$21,-278.21 in 1864.

There was a sudden increase of this balance in 1851, from \$2,794.78 to \$6,454.11, and it arose in 1855 to as high as \$20,000, but was reduced back in 1859 to \$3,000.

The cause of this is explained to be, that in 1850 Mrs. Manson, one of testator's daughters, died; and the executor says that no one appeared with proper authority to receive her portion of the income, and, therefore, he was obliged to keep it in his hands,

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ready at any moment to be paid over; and that when Mrs. Manson's children came of age he paid over to them the income belonging to them, which they received at his hands. He insists that they are now precluded from making any objections to the course pursued by him. The complainants insist that he ought to account for the interest on these balances.

After 1861, it will be observed that the balance grew rapidly, till in 1864, it reached the amount of \$21,278.21. The defendant says that the existence of the war and the blockade prevented him from making any remittances; and that he was obliged to receive the income during this period in confederate state moneys and securities, in which he now has the said final balance on hand.

As before stated, the complainants insist that the bank stock ought to have been disposed of and changed into some safe investment; and that the \$23,000 ought not to have been invested in confederate securities; but that the defendant is responsible for it on several grounds.

These are the principal facts and points in the case. The conclusions to which the master came, and which appear in his report, were,

1. That the defendant was not bound to change the investments of bank stock.

2. That he is responsible for the sum of \$23,075, to be charged against him in 1863, in gold, with simple interest, and that he cannot claim credit for the investment of that sum in confederate securities.

3. That he is chargeable with simple interest on the amounts of income of the moiety of the estate belonging to Mrs. Manson's children, whilst they remained in his hands.

4. That the dividends from stocks received by him in confederate money should be "scaled down" according to Barber's Table, and that the balance of the account, when so amended, should be charged against the defendant.

By a supplementary report, the master states that on reflection, he concludes that the defendant should not be charged at all with the dividends which the banks had paid him in confederate money, because it was not his fault that such currency was paid

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to him; and that the evidence shows him to be still in possession of such notes so paid him.

Without going largely into the reasons which have influenced my judgment in this matter, I will proceed to state the conclusions to which I have come.

I think the defendant is chargeable with the balances of principal money in his hands, from 1832 down to 1861, as for money used by him for his own purposes. The amount of interest annually credited by him was always invariably seven per cent. on a certain amount for the entire year. For several years, it was on \$10,000, \$12,000, \$16,000, \$18,000, and \$20,000; for many years in succession, it was on precisely \$22,000; and for more than twenty years, in succession it was seven per cent. on \$23,000, less seven and one-half per cent. commissions. Now is it credible that these precise amounts were kept out on loan at precisely seven per cent for precisely the entire year? It is impossible to think so. The defendant evidently charged himself with seven per cent. on the amount which he chose to regard as the proper amount to be out on interest. This was nothing else than borrowing the money himself. He treated himself as the borrower. What he did with the money does not appear, except from his general allegation that he lent it out. He cannot, when under oath, remember a single person to whom he lent it. It is manifest that he took it for his own use, on his own responsibility, and at his own risk. And he certainly did so in entire disregard of the directions of the will. He may not have meant wrong personally. He may have allowed to the legatees all the interest that he realized himself; nay, he may have allowed them more than he realized. He clearly did not account to them for what he did realize. It is impossible that his loanings and turnings of the money could have exactly produced just that uniform sum every year. His own accounts prove most conclusively that he used the money himself. He may have loaned it out to others; but where is the account of those transactions? They were never rendered. They were never kept. Under such circumstances the presumption must be taken most strongly against him. He must be charged with the highest amount of interest allowed by the law; and the secret deduction of seven and one-half per cent. for commissions

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must be disallowed. The rate of interest to be charged, therefore, will be, according to the decisions of the courts of this state, eight per cent. down to January 1, 1846, and seven per cent. from that date to 1863. The law, it is true, says six per cent. compound interest after January 1, 1854; but the executor concedes that he made seven per cent. with the money, and he must be charged at that rate. It follows as a necessary corollary to this view of the case that the executor is personally and absolutely responsible for this fund. It is a debt due from him to the trust fund. No inquiry need be made as to the regularity of the investment of the \$23,000 in 1863. That investment cannot avail the executor in the least. By his own breach of trust, the money, if belonging to the estate at all, was lying around on personal security in temporary loans. But it did not belong to the estate; it belonged to him. He had made himself the borrower of it; and, under those circumstances, he cannot discharge himself by procuring such securities as confederate bonds, in a time of civil war, the fate of which was to decide whether they were worth any thing or not.

In reforming the account upon the principles which I have stated, I do not deem it necessary to assume different balances of principal on which to calculate interest from those on which the executor allowed it prior to 1840. It will only be necessary to charge him with the additional one per cent. on the sums which he admits were at interest. He was entitled to some little margin on his balances, to allow him time to make investments. And, upon a careful examination of the account, I do not find that the actual balances prior to 1840 much exceeded the amounts on which he allowed interest in the account. From 1840 to 1847, inclusive, he ought to be charged with interest on \$23,000 instead of \$22,000; for that amount was in his hands during that period. After 1847, he should be charged with the full seven per cent. on \$23,000, without deducting the seven and one-half per cent. commissions, and no commissions are to be allowed on the excess of interest to be accounted for.

The excess of interest to be thus charged in reforming the account should be compounded, with annual rests, at the rate of seven per cent. per annum, down to January 1, 1854, and at the

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rate of six per cent. per annum after that time; and the accounting is to be brought down to the present time; for the executor still owes this money. I do not deem it necessary to state the account on a specie basis, as distinguished from legal currency.

Compound interest must be allowed on the recognized principles applicable to such cases as the present. The language of the supreme court of this state in *Fall v. Simmons*, 6 Ga., 272, aptly expresses the general law on this subject: "Liability to pay simple interest is the rule, compounding is the exception. If the trustee applies the fund to his own benefit in trade, or sells trust stocks and applies the proceeds to his own use, or refuses to follow the directions of the deed creating the trust, as to investments, or conducts himself fraudulently in the management of the funds, and in all other instances depending upon like principles, chancery will direct the compounding of the interest." See also Williams on Executors, p. 1676, ed. 1859, and note. I do not think that the act of 1847 (Cobb's New Digest, 336) is intended to control the operation of equity in such cases. It is the object of that statute to lay down the rule that shall govern the question of interest in ordinary cases.

The court is asked to disallow the ordinary commissions of two and one-half per cent. charged by the executor in his accounts. This I do not think we are called upon to do. The general management of the estate by the executor, independent of the \$23,000, has been successful and productive of a generous income. Whilst the court has the power to disallow this item in cases of misconduct, the circumstances of the case do not, in my judgment, call for it.

When the account has been thus reformed, it will appear that the balances of interest accumulated in the executor's hands from 1843 to the breaking out of the civil war were larger than is shown by the accounts. These balances at one time, after the death of Mrs. Manson, grew to be very large, and the complainants ask that the executor may be charged with interest upon them. He, on the contrary, insists that he had to keep the money ready to be paid over at any time when a person should come forward with the proper authority to demand it. The executor knew precisely what the difficulty was, and that no person

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could be qualified to receive the money until the children came of age, without getting letters of guardianship in this state, of the application for which he, as the agent of the parties, would receive timely information. To pretend that he would have subjected himself to any peril in putting the money out at interest seems absurd. If he had opportunities, as he says he had, for lending out \$23,000 of the *corpus* of the fund, without hazard that he was not willing to assume, he surely could have loaned out the \$15,000 to \$20,000 of accumulated interest. But he need not have loaned it out on mere personal security; he could have loaned it out on call, or on call with reasonable notice, upon securities abundantly safe, and was under no necessity of, and had no sufficient excuse for keeping such a large amount of money, belonging to minors, entirely idle and unproductive. I think he must be charged with simple interest, at six per cent., on the balances of interest due to the Manson family, year by year, up to 1858, inclusive, when he paid over the bulk of the accumulation to the children of Mrs. Manson. That amount was due to them, and should have been paid them. Simple interest at six per cent. per annum should be charged upon the aggregate amount from January 1, 1859, to the present time. That amount, at least, could have been realized on temporary loans. It is a debt due from the executor to the Manson children, and has never been discharged. I do not deem it necessary to charge him with compound interest on this item, because the children themselves have neglected to claim it. But I cannot regard their laches in not claiming it, or their acquiescence in the receipt of what the executor saw fit to pay them, as estopping them from claiming it now, either on the ground of the statute of limitations or any other ground. The very meagre accounts which the executor was in the habit of rendering to the legatees, consisting of mere aggregate sums of receipts and expenditures for the year, conveyed them no information which ought to stop their mouths with regard to the accuracy of the accounts, or to charge them with sleeping over their rights.

I would only observe in addition, that the amount of income in the executor's hands, due and payable before the commencement of the war, became a personal debt, and he is responsible

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therefor. Whatever the balance may have been at the close of the year 1860, less the two sums of \$1,496.34 and \$2,809.77, remitted in January and May, 1861, will be charged to the executor.

The only remaining question relates to the alleged neglect of the executor to change the investments of bank stock on the breaking out of the war. I do not think that he is chargeable with negligence on this score. The investment was authorized by the will. Indeed, some of the stock now held belonged to the testator himself at the time of his death. For such public and national calamities as war, foreign or civil, and the vicissitudes of fortune which attend them, no individual, who does not incite them, is responsible. And in the midst of the public alarm and disorder consequent thereon, no man, however prudent, can be expected to forecast what is best or most expedient to be done with property or investments, his own or those which he holds in trust. All property, all human interests, nay, life itself, is bound up in the national destinies which decide the fate or control the prosperity of the country in which it is situated or enjoyed. Whatever is at stake therein must abide by this law. No human foresight or sagacity can provide against the vicissitudes to which the human race itself is subject. Where was the man in 1861 to tell the executor what he should do, or what was most wise to be done? Was it his duty to emigrate from the country, or to send the property in his charge out of it? No one will contend for such an absurd proposition. For, to what country should he go, which might not be subject to the same convulsions?

Considerations of like character exonerate him from responsibility for the dividends received on the stock. What he received, he must account for—nothing else. It is contended that he ought to have converted the confederate funds received by him for dividends into gold or exchange, and to have transmitted them to the legatees. I do not think he was bound to attempt this. The perils were too great. He would have been chargeable with negligence had a loss occurred thereby. If anything could have been done by him more prudent than he did do, it might, perhaps, have been, to purchase gold and keep it on hand, or to

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invest in stocks or property. But where was the security of his keeping possession of gold? And in what securities or property could he have invested which were not exposed to loss or destruction?

Without attempting, therefore, to decide the delicate questions arising on the laws passed in 1861 and 1863, authorizing executors and trustees to invest in confederate securities and to receive confederate funds, which I think are to be regarded as valid and binding where they do not conflict with the savings and reservations of the constitution of 1868, I do not hold the executor responsible for the loss of the funds received by him for dividends in confederate money or notes, which he was obliged to accept at the time.

A decree will be made in conformity with this opinion, and a new trustee appointed.

APRIL TERM, 1874.

ISAAC SEELEY VS. JULIUS KOOX.

(Before Woods and ERSKINE, JJ.)

1. In an action on the case to recover the forfeit provided for in section 4 of the act of May 31, 1870 (16 Stat. 141), the declaration must aver that the plaintiff was prevented from voting, by force, bribery, threats, intimidation, or other such unlawful means.
2. A declaration which alleges that the unlawful means by which the plaintiff was prevented from voting was the erroneous decision of the defendant, who was an officer of the election, upon a question of law, without averring that the decision was willfully or maliciously wrong, is insufficient.

This cause was heard on general demurrer to the declaration.

Mr. Isaac Seeley, in pro. per.

Messrs. Julian Hartridge and W. S. Chisholm, for defendant.

Woods, Circuit Judge. Section 4 of the act of congress, approved May 31, 1870, entitled "An act to enforce the right of

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citizens of the United States to vote in the several states of this Union," and for other purposes (16 Stat., 141), declares:

"That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent or obstruct any citizen from doing any act required to be done to qualify him to vote, or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be guilty of a misdemeanor; and shall on conviction thereof be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court."

The constitution of the state of Georgia, art. II, sec. 2 (Code of 1873, p. 908), provides that a person to be an elector "shall," among other things, "have resided in this state six months next preceding the election, and shall have resided thirty days in the county in which he offers to vote, and shall have paid all taxes which may have been required of him and which he may have had an opportunity of paying agreeably to law for the year next preceding the election."

Section 1283 of the Code of Georgia, of 1873, prescribes the following oath to be taken and subscribed by superintendents of elections in the state:

"All and each of us do swear that we will faithfully superintend this day's election; * * that we will make a just and true return thereof, and not knowingly permit any one to vote unless we believe he is entitled to do so according to the laws of this state, nor knowingly prohibit any one from voting who is so entitled by law," etc.

On the second day of October, 1872, the plaintiff, claiming to be an elector under the laws of the state of Georgia, offered to vote at an election held on that day in the city of Savannah for governor and members of the general assembly. The defendant was a superintendent at the poll where plaintiff offered to vote, and refused to receive his ballot.

The plaintiff thereupon brought this suit, the same being an

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action on the case to recover the forfeit of five hundred dollars provided for in section 4 of the act of congress above quoted.

The charge in the declaration is that the defendant "did by unlawful means prevent the plaintiff from voting at said election, the said unlawful means then and there being the holding and deciding that the plaintiff must show that he had paid all legal taxes for the year 1871, the said year not being the year next preceding said election, which the plaintiff admits he had not paid, but avers he had paid all legal taxes for the year 1872 in the manner prescribed by law."

A second count alleges that the defendant did unlawfully hinder and prevent the plaintiff from voting at said election, by refusing his vote, for the reason that the plaintiff had not paid his taxes for the year 1871, when in fact the plaintiff was a legal voter without the payment of any tax whatever.

It will strike the most careless reader of section 4 of the act of congress, above quoted, that the same state of facts that would authorize a recovery in this case would also authorize a conviction of the defendant for a misdemeanor with a penalty of fine or imprisonment, or both, at the discretion of the court. We must therefore construe this section with the same strictness that we would any other penal statute. The question then arises, Would the facts stated in the declaration authorize a conviction in a criminal prosecution under this section? The offense described in the section is the preventing of any qualified elector from voting, "by force, bribery, threats, intimidation, or other unlawful means." It is clear that the words "other unlawful means" refer to something akin to force, bribery, threats or intimidation.

Lord BACON observed "that as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated." Hence, the celebrated rule that "where particular words are followed by general ones, as if after an enumeration of several classes of persons or things, there is added 'and all others'; the general words are restricted in meaning to objects of the like kind with those specified." 1 Bish. Crim. Law, sec. 275 and cases there cited.

The "unlawful means" charged as having been used by the

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defendant are not of a like kind with those specified, to-wit: "Force, bribery, threats or intimidation." The defendant was acting under oath as a public officer in a *quasi* judicial capacity, and it is charged against him that while so acting he did not construe correctly an obscure clause in the constitution of Georgia. It is not alleged that he decided against the right of plaintiff to vote, knowing that plaintiff had that right or that his decision was willfully wrong, malicious or corrupt. Giving the most liberal construction to the averment of the declaration, it only amounts to this, that the defendant fell into error in passing upon the plaintiff's right to vote; that he construed that clause of the constitution which declares that "the elector must have paid all taxes which may have been required of him, etc., for the year next preceding the election," to mean the year which ended on the 31st of December before the election, and not the year current, when the election was held. Can it be possible that congress meant to impose a forfeit of \$500, to be recovered in a civil action, and a fine not less than \$500 or imprisonment not less than one month nor more than one year, or both, to be inflicted by a criminal prosecution upon an officer, acting under oath, who had made an innocent mistake in judgment? The proposition is too absurd to be entertained.

The declaration then utterly fails to make out a case for recovery. The elector who is prevented from voting cannot recover, unless he shows that he was prevented either by force, bribery, threats, intimidation or other such unlawful means. If it had been averred that the defendant willfully and maliciously or corruptly decided against the plaintiff's right to vote, well knowing he had such right, and thereby prevented him from voting, it is possible the declaration might be sustained. Without some such averment it presents no cause of action against the defendant.

Demurrer sustained, and leave given plaintiff to amend.

ERSKINE, District Judge, concurred.

NOTE.—Public officers, acting in a judicial capacity or in matters requiring the exercise of judgment and discretion, are not liable for damages resulting from their mistakes. *Harman v. Tappenden*, 1 East, 555; *Jenkins v. Waldron*, 11

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Johns., 120; *Wilson v. Mayor*, 1 Denio, 599; *Weaver v. Davenport*, 3 id., 117; *Griffith v. Follett*, 20 Barb., 621; *Mills v. Brooklyn*, 32 N. Y., 489; *Kendall v. Stokes*, 8 How., 87.

INCREASE C. PLANT et al vs. DANIEL F. GUNN et al.

(Before WOODS and ERSKINE, JJ.)

1. A contract will not be avoided on account of duress by imprisonment, unless the imprisonment was unlawful, and the contract was made during the imprisonment, and in consideration of release therefrom.
2. Under the code of Georgia, the threat of a criminal prosecution is not such duress as would avoid a contract.
3. Where A. is justly indebted to B., and B. threatens A. with a criminal prosecution if A. does not secure the debt, which, in justice, A. ought to do, and A. gives a mortgage, the mortgage is not void on the ground that it was executed to compound a felony.
4. A judgment is the decision or sentence of the law, pronounced by a court and entered upon its records.
5. The record of a judgment is notice only of what it contains.
6. The code of Georgia and the practice of the courts of the state require the proceedings and judgments of the courts to be entered upon the minutes, which are the authentic record of what is done by the courts.
7. Where the only evidence of a verdict and judgment was the indorsement thereof by the plaintiffs' attorney upon the declaration and the words "Nov. T., 1866, verdict," on the bench-docket: *Held*, that this was not such a judgment as constituted a lien upon the defendants' property, and a subsequent order of the court entering judgment *nunc pro tunc* would not give the judgment a lien upon the property of defendant, superior to a mortgage executed by him prior to the *nunc pro tunc* order.

IN EQUITY.

Submitted for final decree upon pleadings and evidence.

Messrs. Clifford Anderson and W. U. Garrard, for complainants.

Messrs. A. R. Lawton and C. N. West, for defendants.

WOODS, Circuit Judge, stated the case and delivered the opinion of the court.

In the year 1869, a firm composed of James H. Woolfolk and two other partners was adjudicated bankrupt, and Joseph E.

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Murray was appointed trustee of the bankrupts' estate. Some time thereafter, certain real estate, the individual property of James H. Woolfolk, was sold by the trustee for the sum of \$5,834, and the proceeds were held by the bankrupt court, subject to its order for proper distribution.

This fund is now claimed by the complainants on the one hand, and by the defendant, Daniel F. Gunn, as guardian, on the other. The prayer of the bill is that the fund may be applied to the payment of complainant's judgment.

The claim of Gunn is based upon a judgment which he says he recovered at the November term, 1866, of the Bibb county superior court, for \$11,212, against Thomas J. Woolfolk and the said James H. Woolfolk as principals, and John W. Woolfolk as surety.

The claim of the complainants is based upon a mortgage executed by James H. Woolfolk to them on the 7th day of December, 1868, upon the lands sold by Murray, to secure certain debts due from the firm, of which James H. Woolfolk was a member. A judgment of foreclosure was obtained on this mortgage at the October term, 1869, of the Bibb superior court, against James H. Woolfolk for \$4,963.

A judgment of a court of record in Georgia is a lien upon all the real and personal property of the judgment debtor within the state, and if the defendant Gunn recovered a valid judgment against James H. Woolfolk in 1866, it became from its date a lien upon all the real estate of which Woolfolk was then seized, among which was the land afterwards mortgaged to the complainants.

The complainants, however, claim that their lien is the older and better one, although apparently subsequent in point of time, because the judgment of Gunn was not, as they say, a valid judgment at the time it purports to have been rendered, nor until after the execution of their mortgage.

This claim is based upon the following facts: At the November term, 1866, of the Bibb superior court, at which Gunn claims to have recovered his judgment against James H. Woolfolk and others, no verdict or judgment was entered upon the minutes of the court, nor at any subsequent time until the April term, 1871, of

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the same court, when an order was made that the verdict, which the court at that time found was rendered at the November term, 1866, be entered upon the minutes. And at the same term, it appearing that judgment for the interest found by the verdict had not been taken, the court entered judgment for the interest, *nunc pro tunc*.

The only evidence of any verdict or judgment in the case of *Gunn v. James H. Woolfolk and others*, at the November term, 1866, is the verdict of the jury indorsed upon the declaration, and a judgment for the principal sum due, also written upon the back of the declaration by the plaintiff's attorney and signed by him.

There is also an entry on the bench docket in the judge's handwriting, immediately opposite the case of *Gunn v. Woolfolk and others*, of these words: "Nov. T., 1866, verdict."

According to the practice in Georgia, courts of record, such as the Bibb superior court, are required to keep minutes of their proceedings, in which must be entered all verdicts of juries, and judgments, decrees and other proceedings of the court. These minutes are the authentic record of what transpires in or is done by the court.

There is no entry to be found upon the minutes of the Bibb county superior court, of any verdict or judgment, or of any other proceeding whatever in the case of *Gunn v. James H. Woolfolk and others*, until the April term, 1871, when this entry appears: "It appearing to the court that the plaintiff failed to enter his judgment for the interest as contemplated by the verdict, it is therefore ordered, upon motion of plaintiff's counsel, that plaintiff have leave to amend said judgment, so far as the interest is concerned, *nunc pro tunc*." At the same term, it being made to appear to the court, from the bench docket and original papers, that a verdict was rendered by the jury in the case at the November term, 1866, and not entered upon the minutes, the court ordered the verdict to be entered, *nunc pro tunc*.

At a subsequent day of the same term a formal judgment was rendered *nunc pro tunc*, for interest on the said sum of \$11,212.38, from the 14th day of April, 1860, until paid, "this judgment

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for interest to take effect now for then." It is not pretended that any judgment for interest had ever been in fact rendered before the April term, 1871, nor do the minutes of the court show that any judgment whatever had ever been rendered for the principal sum, nor do they show any judgment *nunc pro tunc* for such principal sum.

The defendant Gunn claims that before the execution of the mortgage to complainants by James H. Woolfolk, they had notice of his judgment against Woolfolk and others, which he claims was rendered at the November term, 1866. The evidence upon this point is as follows: James H. Woolfolk testifies, that at the time of giving the mortgage, he told Plant, the complainant, that he, Woolfolk, was defendant in a judgment in favor of Gunn, against himself and John W. Woolfolk as sureties and Thomas J. Woolfolk, principal.

Thomas J. Woolfolk testifies, that he was present at the execution of the mortgage to Plant and others. Plant asked the witness whether there were any incumbrances upon the property about to be mortgaged, and witness told him none, except a judgment in favor of Gunn for an old debt against Thomas J. Woolfolk, principal, and James H. and John W. Woolfolk, sureties.

The defendant Gunn attacks the mortgage of complainants, and asserts that it was obtained either by duress or for the compounding of a felony.

The facts upon this branch of the case are these:

The firm of Woolfolk, Walker & Co., in which James H. Woolfolk was a partner, held in their warehouse a quantity of cotton, which was pledged to secure a debt due from Woolfolk, Walker & Co., to Plant & Co., for money advanced by them upon said cotton. Plant & Co. held the warehouse receipts of Woolfolk & Co. for the cotton. The latter firm appropriated the cotton, and were not able to produce it upon the demand of Plant & Co.

I. C. Plant thereupon said to James H. Woolfolk, that if he did not pay the debt due from Woolfolk, Walker & Co., to Plant & Co., he would commence a criminal prosecution under the law of Georgia, for misapplying the cotton left with them in trust; that he would send him to the penitentiary if he did not secure

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the debt by mortgage or otherwise. The result was that James H. Woolfolk gave the mortgage to Plant & Co., to secure their debt. James H. Woolfolk was actually arrested, whether on a civil or criminal process does not appear, and taken before a magistrate and threatened with a criminal prosecution, for having obtained money upon cotton receipts after the cotton had been sold. There is no evidence that the mortgage was executed while James H. Woolfolk was in arrest, but Woolfolk testifies that he gave it on account of the threats of I. C. Plant, above stated.

These facts present the only questions which, in the view we take of the case, it is necessary to pass upon. These questions are:

1. Was the mortgage executed by James H. Woolfolk to Plant & Co. void, because given under duress, or because the consideration therefor was the compounding a criminal prosecution; and,

2. If the said mortgage is not void, is it prior in date and equity to the judgment of the defendant Gunn? Of these in their order.

Was the mortgage obtained by duress? By duress is meant, "an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or to discharge one. 1 Bouvier's Institutes, 226.

"If I be arrested upon good cause, and being in prison or under arrest, I make an obligation feoffment or any other deed to him at whose suit I am arrested, for my enlargement, and to make him satisfaction, this shall not be said to be by duress, but is good and shall bind me." 1 Sheppard's Touchstone, 62.

If a man be illegally deprived of his liberty until he sign and seal a bond, he may allege this duress and avoid the bond. But if a man be legally imprisoned, and either to procure his discharge or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. Coke's 2d Inst., 482; *Watkins v. Baird*, 6 Mass., 506.

The testimony in this case shows no actual or threatened violence to the person, nor any illegal imprisonment to obtain release from which the mortgage was executed. In fact, the testi-

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mony does not show that there was any imprisonment, legal or illegal, at the time of the execution of the mortgage, or that the mortgage was executed in pursuance of a promise to execute it on condition of release from imprisonment. There is nothing in the record that in the slightest degree tends to establish the fact of duress, as defined by the common law.

"Duress," as defined by the code of Georgia, sec. 2637, "consists in any illegal imprisonment or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."

There was no imprisonment, legal or illegal, in this case, which was used to coerce the execution of the mortgage. There were no threats of bodily or other harm. Was a threatened criminal prosecution such "other means," mentioned in the code, as would amount to duress? The supreme court of Georgia, in the case of *Russell v. McCarty*, 45 Ga., 197, in construing section 2637 of the code, say it is not.

We are of opinion, therefore, that neither by the common law nor the statute law of Georgia was there any duress in this case.

Was the note given for the compounding of a felony? In our judgment the evidence utterly fails to establish this position. There is no evidence that a criminal prosecution was commenced. The arrest spoken of by James H. Woolfolk may have been on a civil process. The proof simply goes to this extent, that Plant threatened Woolfolk that he would prosecute him and send him to the penitentiary if he did not pay or secure the debt due to Plant & Co.

To avoid an obligation on the ground that it was given for compounding a felony, it must appear that the compounding of the felony was the consideration of the obligation. Such is not the case here. The consideration of the mortgage was a *bona fide* debt due from Woolfolk and his partners to Plant & Co. It was the duty of Woolfolk, under the circumstance, to pay or secure this debt. A threat of a criminal prosecution, unless the mortgage were given, does not compound the offense.

Besides, it appears from the evidence of James H. Woolfolk, that he had been guilty of no criminal offense, that the cotton

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had been disposed of by his partners in his absence and without his knowledge. If this be true, and it is uncontradicted, there was no felony to compound.

We are of opinion, therefore, that the mortgage to complainants was a valid mortgage.

It remains to consider, which was the older and better lien upon the property which produced the fund in court about which this controversy has arisen.

This will depend upon the date when the judgment of Gunn is to have effect, as to persons not parties to it.

A judgment is the decision or sentence of the law upon facts found or admitted by the parties or upon their default in the course of a suit. *Tidd's Prac.*, 930.

But a bare decision of a court is not a judgment; there must be a formal order entered upon it. *Boker v. Bronson*, 5 Blatch. C. C., 5.

A judgment is, therefore, the decision or sentence of the law pronounced by a court and entered upon its dockets, minutes or records. The judgment of a court can only be shown by its records. Where there is no record there is no judgment.

What constitutes the record of a court according to the law and practice of Georgia?

By the code of Georgia, sec. 267, it is made the duty of the clerk to attend all sessions of the court, and keep fair and regular minutes of its proceedings from day to day, including a transcript of the judge's entries on his docket, when not more fully shown in a book kept for that purpose.

All proceedings of the court, even continuances, should be placed upon the minutes. *Brady v. Little*, 21 Ga., 155.

"The entry on the bench docket, as we have repeatedly held, is not the proper evidence as to what has been done or adjudicated by the court." *Harvell v. Armstrong*, 11 Ga., 330.

In the case of *Lea v. Yates*, 40 Ga., 56, the supreme court of this state held: "That a confession of judgment for a sum of \$——, with interest and costs of suit, would not sustain a judgment entered up for a specified sum; that such a judgment was no lien on the property of the defendants, and a subsequent order of the court amending the confession by filling the blank

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will not create a lien on the property purchased from the defendant, *bona fide*, prior to such order. The record was only notice of what it contained, and was not notice that there was any legal judgment against the defendants or any lien upon their property."

Under such a practice, there is no room left for doubt, that the records of the Bibb superior court contained no evidence of the judgment of Gunn until more than two years after the mortgage to complainants had been executed. As to third parties, there was no judgment until the *nunc pro tunc* order directing an entry upon the minutes.

The memorandum of a judgment which the attorneys for Gunn indorsed upon the declaration at the November term, 1866, was only for the principal sum due. There is no claim that any judgment for interest was rendered at that time. Down to this day, so far as the record shows, there has never been a judgment entered upon the minutes of the court, either by *nunc pro tunc* order or in any other manner for the principal sum claimed to be due Gunn. The only judgment ordered to be entered *nunc pro tunc* was a judgment for interest, and this was entered for the first time at the April term, 1871.

It cannot be said, that what Woolfolk told Plant about the judgment against himself can make a judgment when there was none. Suppose Plant had gone to the record to find the date and amount of the judgment of which Woolfolk spoke. The minutes of the court and judgment docket would have shown that no such judgment existed. He cannot be charged with notice of anything more than the records of the court revealed. All that he could have learned, even by reading every paper in the case, would be that the jury had rendered a verdict which had never been entered on the minutes of the court, and upon which the court had never pronounced any judgment.

Such a record as that is notice of *lis pendens* and nothing more.

The subsequent action of the court, in ordering the verdict and judgment to be entered upon the minutes, could not affect the rights of intermediate incumbrancers. It would avail, at most, as between the parties to the judgment.

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We think, therefore, that the mortgage of the complainants and the judgment recovered thereon is valid and binding, and that it constitutes a lien upon the fund in court, the proceeds of the mortgaged premises, superior to the lien of the judgment recovered by defendant Gunn.

ERSKINE, District Judge, concurred.

NOVEMBER TERM, 1874.

A. & R. STRAIN vs. R. N. GOURDIN, Assignee.

1. A bill of exceptions which shows that the exceptions to the rulings of the court below were not taken at the trial, but were taken for the first time four days after the verdict and judgment, will not, as a matter of right, be considered by the court.
2. A statement made by counsel for plaintiff in error of what he understood the evidence to be, on the trial of the cause in the court below, which is not made a part of the bill of exceptions, and is not verified by the signature of the judge, forms no part of the record, and no matter how formally certified by the clerk, will not as a matter of right be considered by the court on error.
3. The drawing of a check and the delivery thereof to the payee, without presentation, acceptance or payment, does not transfer from the drawer to the holder of the check so much of the fund drawn on as is equal to the sum named in the check.
4. Advice of counsel given to debtors in failing circumstances, that unless they paid their depositors, they would be liable to a criminal prosecution under the state laws, does not take the case out of the operation of the 35th section of the bankrupt act, and make a payment to the depositors a good one.
5. A debtor can not, without the consent of his creditor, substitute another person in his stead as the debtor.
6. The ratification by one, of the unauthorized act of another, can not have a retroactive efficacy so as to defeat the rights of third persons which have intervened between the act ratified and the ratification.

ERROR to the District Court.

Mr. R. E. Lester, for plaintiff in error.

Mr. Geo. A. Mercer, for defendant in error.

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Woods, Circuit Judge. The record in this case sets out the pleadings and process, the verdict, judgment and certain exceptions to the rulings of the court upon the admissibility of the evidence, and the charge of the court to the jury.

The declaration alleges the appointment of Gourdin as assignee of Ketchum & Hartridge, and avers that said A. & R. Strain are indebted to him as such assignee in the sum of \$2,250, because on June 1, 1873, the said Ketchum & Hartridge, being indebted to said A. & R. Strain in the amount aforesaid, and being insolvent and in contemplation of insolvency within four months of the filing of the petition in bankruptcy against them, and with a view to give a preference to said A. & R. Strain, paid over to them the said sum of \$2,250, said A. & R. Strain having at the time reasonable cause to believe that said Ketchum & Hartridge were insolvent, and that said payment was made in fraud of the bankrupt act; and said A. & R. Strain received said money and appropriated it to their own use, and thereby became indebted to the plaintiff in said amount.

To this declaration the defendants pleaded the general issue. The verdict and judgment were for the plaintiffs in the court below for the amount claimed, and the judgment was rendered on April 25, 1874.

The bill of exceptions states that the defendants excepted to the ruling out of certain evidence offered by defendants, and to certain charges of the court, but does not show what the evidence ruled out was, nor does it set out any of the evidence in the case by which this court can judge whether the charges given were correct or not. It also appears from the bill of exceptions that the exceptions were not taken at the trial, but on April 29, 1874, four days after the verdict and judgment.

It is impossible for this court to say, upon this bill of exceptions, whether the court below fell into any error or not.

We cannot say whether the evidence ruled out was properly ruled out or not, because there is no statement to show what the evidence was or for what purpose it was offered. Neither can we say whether the charge of the court was correct or not, for the facts to which it is applicable are not shown. Error is never

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presumed; it must be made to appear. *Cliquot's Champagne*, 3 Wall., 140.

But it appears from the bill that the exceptions were taken four days after verdict and judgment. To be effectual, they must be taken at the trial, although the bill itself may be signed after the trial. *Bradstreet v. Potter*, 16 Pet., 317; *Stimson v. Westchester Railroad Co.*, 3 How., 553; *Pomeroy's Lessee v. The Bank*, 1 Wall., 592, 599, 600; *French v. Edwards*, 13 id., 506.

There is, in the record, a petition for a writ of error, which purports to set out all the evidence in the case. This court can take no notice of this. It is not made a part of the bill of exceptions; it is not verified by the signature of the judge, but is simply the statement of the counsel for plaintiffs in error, of what they understood the evidence to be. This forms no part of the record, no matter how formally certified by the clerk, and this court is not bound to take notice of it. *Suydam v. Williamson*, 20 How., 428, 433, 437, 440; *Pomeroy's Lessee v. The Bank*, 1 Wall., 592; *Young v. Martin*, 8 id., 354; *Thompson v. Riggs*, 5 id., 675; *Reed v. Gardner*, 17 id., 409.

Although the bill of exceptions is ineffectual to present the points to which exception was taken, I have looked into the statement of the evidence presented by counsel for the plaintiffs in error, to determine whether the court below did in fact fall into error.

It appears from this statement, that A. & R. Strain, living at Darien, Georgia, had on deposit with Ketchum & Hartridge, before their bankruptcy, the sum of \$2,250. Early in April, 1873, Ketchum & Hartridge became embarrassed. On April 14th, they became satisfied that they must stop payment, and on that day, took legal advice about the propriety and duty of providing for the payment of their depositors, and were advised that they would be liable to a criminal prosecution under the state laws if they failed to pay their depositors.

On the 15th of April, they procured certificates of deposit in the Savannah Bank & Trust Company for the amounts due their several depositors, among them one for the amount due A. & R. Strain and payable to their order.

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On the 16th of April, Ketchum & Hartridge telegraphed to A. & R. Strain as follows:

“We have stopped payment; you will lose nothing; where shall we deposit your funds?”

This was the first intimation that A. & R. Strain had of the failing condition of Ketchum & Hartridge. To this, on the same day, they replied: “Place the funds in the Southern Bank of Georgia.” Thereupon Ketchum & Hartridge turned over the certificate of deposit to the Southern Bank of Georgia, where it was placed to the credit of A. & R. Strain.

The defendants below offered in evidence four checks drawn by them on Ketchum & Hartridge, amounting, in the aggregate, to \$1,312; the first dated April 2d and the last April 14th, but it was conceded that none of them had been presented or paid. These checks were ruled out by the court.

On these facts and the charge of the court, as set out in the paper called the petition for writ of error, the following questions appear to have been raised. Were the checks drawn by A. & R. Strain admissible in evidence to show an appropriation *pro tanto*, before the failure of Ketchum & Hartridge of the funds deposited with them?

In other words, does the simple drawing of a check and delivery thereof to the payee, without presentation, acceptance or payment, transfer the fund drawn on, to the amount of the check, from the drawer to the holder of the check?

The authorities answer this question in the negative. Morse on Banks and Banking, 471; *Mandeville v. Welch*, 5 Wheat., 286. See *Bank of the Republic v. Millard*, 10 Wall., 157, and numerous cases there cited.

These checks were offered for the purpose of reducing the amount due from Ketchum & Hartridge, at the time of their failure, to A. & R. Strain. It is clear, upon the authorities cited, they were not admissible for that purpose, and were, therefore, properly ruled out.

The next question presented is, whether the legal advice received by Ketchum & Hartridge that unless they paid their depositors, they would be liable to a criminal prosecution, would

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take the case out of the operation of sec. 25 of the bankrupt act, and make the payment to their depositors a good one.

There seems to be no warrant in the language of the section for making an exception of such a payment.

"It is wholly immaterial whether the preference was voluntary or involuntary, or by reason of threats or coercion. The voluntary or involuntary character of the transaction is not important. *Foster v. Hackly & Sons*, 2 B. R., 406; *Wilson v. Brinkman et al.*, 2 id., 468. *In re Bachelder*, Lowell's Dec., 373; *Giddings v. Dodd*, 1 Dill., 115; *Sawyer v. Turpin*, 5 B. R., 339; *In re McKay & Aldus*, Lowell's Dec., 561.

The last point presented is whether the procuring by Ketchum & Hartridge, on the 15th of April, of a certificate of deposit in the Savannah Bank & Trust Company for the amount due from them to A. & R. Strain, and payable to their order, was a payment to them. The plaintiffs in error claim that it was, and as it was made before they had any reason to suspect the insolvency of Ketchum & Hartridge, that it was a good payment. I cannot coincide in this view.

Ketchum & Hartridge, being the debtors of A. & R. Strain, could not, without the consent of A. & R. Strain, substitute another person in their place as the debtor. If after Ketchum & Hartridge had procured the certificate of deposit for A. & R. Strain, and before any ratification the Savannah Bank & Trust Company had failed, A. & R. Strain could still have held Ketchum & Hartridge liable.

But it is claimed that the subsequent ratification by A. & R. Strain, of what had been done by Ketchum & Hartridge in taking the certificate of deposit, relates back to the date of the certificate, and makes it a payment as of that date. And as the certificate bears date before A. & R. Strain had any notice of the insolvency of Ketchum & Hartridge, the payment is a good one.

"The general rule as to the effect of a ratification by one of the unauthorized act of another respecting the property of the former is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of

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the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification." *Cook v. Tullis*, 18 Wall., 338.

I think this case falls clearly within the qualification here laid down to the general rule. When the insolvency of Ketchum & Hartridge was brought to the notice of A. & R. Strain, on the 16th of April, the rights of other creditors instantly intervened, and they could ratify no previous payment to their prejudice.

I am of opinion there is no error in the proceedings of the district court. Its judgment is therefore affirmed.

AT CHAMBERS, MAY, 1875.

JOHN P. BRANCH VS. THE MACON & BRUNSWICK RAILROAD COMPANY et al.

(Before BRADLEY and ERSKINE, JJ.)

1. A security, given by way of indemnity to a surety, may be reached and applied directly to the payment of the debt, on the application of the creditor, and the surety cannot prevent such application.
 2. A state indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien on all the property of the company; and that upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale: *Held*, that at the suit of a holder of bonds of a subsequent issue, which the state had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the state, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the state, nor appoint a receiver therefor.
 3. The relief asked in such a case could not be granted without adjudicating the rights of the state, which ought not to be done unless the state were a party, and the state could not be made a party.
 4. Where a question decided by a state supreme court is one of general jurisprudence, not depending upon any special statutory law of the state, the United States courts sitting in the state are, as courts of coördinate jurisdiction
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with the state court, not absolutely bound by such decision, but will give it such weight as the respect due the learned court which made the decision would properly require.

IN EQUITY.

Heard on motion for preliminary injunction and for the appointment of a receiver.

By an act of the legislature of Georgia, passed December 30, 1866, the governor of the state was authorized to place the indorsement of the state upon the bonds of the Macon & Brunswick Railroad Company to the amount of ten thousand dollars per mile, for as many miles of railroad as might be completed, provided the road was free from liens or mortgages to endanger the securities of the state, and upon the express condition and understanding that such indorsement should vest the title of all property purchased with said bonds in the state until the bonds should be paid, and should operate as a prior lien or mortgage on all the property of the company; and on failure of the company to pay interest or principal when due, it was made the duty of the governor, upon information being given, to seize and take possession of all the property of the company, and apply the earnings of the road to the extinguishment of the bonds or coupons, and to sell the road and its equipments and property in such manner and at such time as in his judgment might best subserve the interest of all concerned. The amount of bonds authorized by this act was issued and indorsed by the governor in accordance with the act, amounting to \$1,950,000. In 1868, the people of the state adopted a constitution, by which it was, among other things, provided, that the credit of the state should not be granted or loaned to aid any company, without a provision that the whole property of the company should be bound for the security of the state, prior to any other debt or lien, except to laborers, nor to any company in which there was not already an equal amount invested by private persons. On the 27th of October, 1870, the legislature passed an act amending the act of December 3, 1866, before recited, so as to authorize the governor to place the indorsement of the state to the extent of three thousand dollars per mile, upon the bonds of said company, in addition to the ten thousand first authorized. Under the latter act,

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the company issued and the governor indorsed bonds, to the amount of \$600,000.

On the 14th of August, 1872, the legislature, by resolution, declared the state's guaranty placed on the bonds of the said company, binding on the state. Afterwards the complainant became the purchaser and owner of a number of bonds of the last issue of \$600,000. Interest not being paid on the bonds, the governor of the state, in July, 1873, seized and took possession of the railroad of the company on behalf of the state, and appointed a superintendent to conduct its operations, and the state, by its agents appointed by the governor, remained in possession thereof up to the time of hearing the motion; the defendant, Edward A. Flewellen, was the agent or receiver having the management thereof. On the 6th of March, 1875, the legislature passed a resolution, declaring the first issue of bonds valid and binding on the state, but the second issue, of \$600,000, unconstitutional, null and void, and also declaring that the governor ought to sell the road, property and franchises of the company as early as practicable, upon such terms and for such price in money or first mortgage indorsed bonds of the said company, or bonds of the state, as, in his judgment, might be consistent with the interests of the state. Accordingly the governor, on the 5th day of April, 1875, issued his order directing the said Flewellen to advertise the sale of the road and property of the company, at auction, in the city of Macon, on the first Tuesday of June, 1875, upon the terms mentioned in the last resolution, and the said Flewellen advertised the same accordingly.

Messrs. W. H. Hull, G. T. Barnes and J. B. Cumming, for complainant.

Messrs. L. E. Bleckley, A. W. Hammond and N. J. Hammond, for defendants.

BRADLEY, Circuit Justice. The complainant has filed the present bill, in which he prays for an injunction to prevent the said sale, and the appointment of a receiver to take possession of and sell the said road and property, under the direction of this court. The ground of the application is the apprehension that, in accordance with the legislative resolution of March 6, 1875, the second

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issue of bonds is to be repudiated, and that no part of the proceeds of said railroad will be appropriated to the sale of his bonds. The ground on which the complainant claims a right to have the railroad and other property of the company seized and applied to the payment, as well of the second issue of bonds as of the first, is the well known principle of equity, that a security given by way of indemnity to a surety may be reached and applied directly to the payment of the debt, and the surety cannot prevent such application.

In other words, that the creditors will, in equity, be subrogated to the rights of the surety in reference to the security by which the debtor has indemnified him. The great difficulty in this case arises from the fact that the surety is the state of Georgia, and that the said state is, by its agents and officers, in possession of the property given by way of indemnity. In order to effect the objects of this bill, the state must not only be displaced and the bondholders subrogated in its stead in reference to the property in question, but the courts must dispossess the state of the actual possession of that property. Of course this court has only coördinate jurisdiction with the state courts in this matter, and can only do what the state courts themselves could do in the exercise of general equity jurisdiction. The supreme court of this state has recently held, in the case of *Printup v. The Cherokee Railroad Company*, 45 Ga., 365, that the courts of this state have no power to take a railroad out of the possession of the state. As the question is one of general consideration, not depending upon any special statutory law of the state of Georgia, this court as a court of equal and co-ordinate jurisdiction, would not feel absolutely bound by that decision, but would only give it such regard as the respect due to the learned court which made it would properly require. We are of opinion, however, that the decision has many considerations of weight in its favor. While it is true that in the case of *Osborn v. The United States Bank*, 9 Wheat., 738, and *Davis v. Gray*, 16 Wall., 232, the supreme court of the United States sustained suits against state officers for the recovery or protection of property belonging to the complainants or their trustees, in which the state had no interest or right, and the pretensions of

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the agents, in behalf of the states, were unconstitutional and void, we think no case can be found in which any court has assumed jurisdiction to interfere with property in the possession of the state, and admitted to have come rightfully into its possession. In this case, the railroad in question is as much in possession of the state itself as is the state house, or any other property belonging to it. And then the title, by which the complainants seek to have this court take possession of the property and wrest it out of the hands of the state, is one which admits the title of the state, and is, in truth, none other than that of the state itself, to which the complainant seeks to be subrogated.

The court is asked to make a decree, operating directly upon the rights of the state, and transferring them to the complainant and the other bondholders. It is not merely the possession of its agents, but the actual right and title of the state itself, which are sought to be affected and transferred. We think this cannot be done without making the state a party to the suit, which cannot be done. The state has provided a security for its own indemnity, to be managed in its own way, by its own officers and agents. Can such a security be taken out of its hands, at the instance of the creditors ultimately to be benefited? Can the state be charged as trustee for those creditors, and compelled to give up the trust fund, by a court which has no jurisdiction over it? It seems to us that the difficulties of the case are insurmountable. Again, the state evidently intends to question the validity of the bonds of the second issue, and, if liable only for the first issue, is interested in having the indemnity fund applied to the satisfaction of that issue. To sustain the complainant's case, the court would be compelled to decide upon the state's liability on its guaranty of the second issue of bonds, without having it as a party before it, and, if satisfied of such liability, would have to decide to that effect, because the complainant and his cobondholders have no claim against the railroad except through the equities arising from a valid guaranty of their bonds by the state. The court is called upon, therefore, to adjudicate directly upon the state's liability on the guaranty, without having any jurisdiction over it, as a party, and having

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decided in favor of that liability, it is then called upon to dispose of the fund which the state has taken for its indemnity. The case, therefore, involves a direct adjudication of the rights and liabilities of the state, and an ultimate execution of property in its possession, the state, at the same time, denying its liability and insisting upon its right to maintain its lawfully acquired possession. It seems to us that this is asking the court to go further than any court has ever yet gone, except where legislation has been adopted, authorizing the state to be sued in the same manner as a private party. At all events the right of the complainant is, to our view, so doubtful that we do not feel authorized to exercise the extraordinary powers of this court sought to be put into operation. Without attempting, therefore, to point out to the complainant what other remedy he has, except to rely upon the good faith of the state of Georgia, we feel compelled to deny the motion for an injunction and the appointment of a receiver.

ERSKINE, District Judge, concurred.

AT CHAMBERS, JUNE, 1875.

In re ADOLPH JOSEPH.

(Before BRADLEY and WOODS, JJ.)

1. One creditor of a bankrupt may, without the consent of the assignee, intervene and oppose the allowance of the claim of another alleged creditor.
2. A creditor, whose opposition to the claim of another creditor has been overruled by the district court, may, when such claim is allowed, take the question to the circuit court for review, by bill, petition, or other proper process.

This cause was a petition of review filed under the second section of the bankrupt act. It was heard upon a motion made by the defendants to the petition to dismiss the same on the ground that it did not disclose a case for the revisory jurisdiction of the court.

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Messrs. H. R. Jackson, A. R. Lawton and W. S. Basinger,
for the motion.

Mr. Charles N. West, contra.

Woods, Circuit Judge. E. Waitzfelder & Co., claiming to be creditors of the bankrupt, proved their debt before the register. Cochran, McLean & Co., who it was conceded were *bona fide* creditors of the bankrupt, moved the register to expunge the proof of the claim of Waitzfelder & Co., and testimony having been taken by both parties, the register, by agreement, referred the matter to the judge of the district court. After hearing the evidence, the district judge refused to grant the motion to expunge.

Thereupon, Cochran, McLean & Co. filed their petition under the second section of the bankrupt act, alleging that they were aggrieved by the decision of the district judge, and praying a review and reversal of his order. The revision sought was upon the same motion and evidence as that submitted to the district judge.

Waitzfelder & Co. now move this court to dismiss the petition on the ground that the case is not within the revisory jurisdiction of the circuit court, and this motion presents the question now to be determined.

The second section of the bankrupt act (Rev. Stat., sec. 4986) declares that "the circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court of bankruptcy * * and, except when special provision is otherwise made, may upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as in a court of equity." Two points are presented by this section for solution: (1) Whether one creditor is authorized to make a case or question by opposing the allowance of the debt of another creditor, and (2), if the bankrupt court has overruled his opposition and allowed the debt, whether any "special provision is otherwise made" except by petition of review, by which he can take the case or question to the circuit court for revision.

Upon the first point, it seems clear that one creditor may op-

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pose the allowance of the claim of any other creditor. There is a fixed amount of assets, out of which the creditors are to be paid *pro rata*. Each one is interested in diminishing the claim of every other, for the less the claims of others, the greater will be his own dividend. And the bankrupt act makes direct provision for the intervention of one creditor against the claim of another. Sec. 22 (Rev. Stat., sec. 5881) provides that "the court may, upon application of the assignee, or of any creditor, or of the bankrupt, examine upon oath the bankrupt, or any person tendering, or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality or mistake."

Here is ample warrant for a creditor to intervene and contest the allowance by the district court of the claim of any other creditor. His intervention and opposition raise a case or question in the bankrupt court, and of such case or question the circuit court has revisory jurisdiction by bill, petition, or other proper process, unless special provision is otherwise made therefor.

Is provision otherwise made in the case where one creditor, without the concurrence of the assignee, opposes the allowance of the claim of another creditor? Sec. 8 (Rev. Stat., 4980) of the bankrupt act furnishes the only special provisions for the removal of causes or questions in bankruptcy from the district to the circuit court. It provides that appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error, from the circuit courts to the district courts, may be allowed in cases at law arising under the jurisdiction created by the bankrupt act, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

Here is no provision for any appeal or other revisory proceeding by a creditor who is dissatisfied with the allowance of a claim. The assignee may appeal, but a contesting creditor cannot.

In re Joseph.

When a creditor opposes a claim, he raises a case or question. If it is decided against him, the circuit court has jurisdiction to revise it by bill or petition, unless special provision is otherwise made. But, as we have seen, there is no special provision made for such a case, and it follows that the case or question must be reviewed, if at all, by bill, petition, or other proper process under the second section.

The policy and express provision of the bankrupt act is, to allow a review by the circuit court of every case or question not lodged exclusively in the discretion of the district court, arising in the administration of the bankrupt act by the district court, except where provision has been made for an appeal or writ of error. No more comprehensive language could be found, to embrace every controversy arising in the course of the bankrupt proceedings, than that used in the section conferring revisory power upon the circuit court.

I am of opinion, therefore, that the opposition by one creditor to the allowance of the claim of another creditor, makes a case or question under the bankrupt act; that if the claim is allowed in spite of the opposition of the contesting creditor, no appeal is allowed him, nor other special provision for removing the case or question to the circuit court, and that he may, therefore, by virtue of the provisions of the second section, take the case or question to the circuit court by bill, petition, or other proper process.

In opposition to the views expressed, we have been cited to the following cases: *In re Troy Woolen Co. Bank v. Cooper*, 9 Blatch., 191; *In re Place*, 4 B. R., 178.

In the first case the assignee joined with a creditor in contesting the claim of another creditor, and as the assignee refused to appeal from the allowance of the claim, as he might have done, the court decided that the creditor could not resort to his petition of review. It must be admitted that this case is in point against the views expressed, and that the opinion of the court by which it was decided is entitled to great respect.

The case just mentioned appears to involve the same controversy, in a somewhat different shape, that was decided by the United States supreme court in *Bank v. Cooper*, 20 Wall., 171.

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The proceeding appealed from was a bill filed in the circuit court by the creditor to contest the allowance of the claim of another creditor made by the district court. The supreme court held that, as an original bill, it was without equity. It was then suggested that it might be good as a petition under the second section of the bankrupt act. The court declined to decide whether the case made by the bill presented a proper one for review under that section. But although the bill was demurred to for want of jurisdiction, the court did not decide that a creditor contesting the claim of another creditor could not review by petition in the circuit court, the allowance of the claim by the district court.

The other case cited, namely, *In re Place*, 4 B. R., 178, only decides that when the claim of a creditor is disallowed, he must take the case to the circuit court by appeal, and not by petition of review.

Basing my decision upon the express words of the bankrupt act, I am of opinion that under the facts of this case, Cochran, McLean & Co. had the right to take the decision of the district court allowing the claim of Waitzfelder & Co. to the circuit court, by petition of review.

It has occurred to me that as the assignee has the right to appeal, and the opposing creditor to proceed by petition of review to have the allowance of the claim of another creditor reversed, it is possible that both these remedies might be resorted to at the same time, and thereby present the same controversy to the circuit court in two different forms, and involving different methods of trial. But this difficulty, if it should ever arise, may be avoided by the exercise of the discretion of the circuit court in determining which form of proceeding should be retained. Practically, I think no embarrassment could arise from the case supposed.

The result of these views is, that the motion to dismiss must be overruled.

BRADLEY, Circuit Justice, concurred.

The Patapsco Guano Company vs. Morrison, Trustee.

APRIL TERM, 1876.

THE PATAPSCO GUANO COMPANY vs. ROBERT J. MORRISON,
Trustee, et al.

1. A power in a trust deed to sell and reinvest on the same limitations and trusts does not include by implication the power to mortgage.
2. Nor does a statutory provision giving power to the judge of a court to pass an order authorizing the trustee to sell or convey the *corpus* of the trust estate confer power to authorize the trustee to mortgage it.
3. The federal courts are not bound to follow the construction put upon a state statute by an inferior state court.
4. A trustee, unless expressly authorized, cannot issue negotiable paper executed in his trust character so as to bind the trust estate.

The cause was heard for final decree upon the pleadings and evidence.

The facts were as follows: In the year 1843, the defendants Gideon A. Dowse and Sarah A. Dowse, then Sarah A. Morrison, being about to marry, entered into an ante nuptial contract with George Harris, since deceased, and the defendant Robert J. Morrison as trustees. This contract, after reciting that it was desirable that a proper settlement and provision should be made for said Sarah A., and any child or children she might have, and that the said Sarah A. was then the owner of several slaves and about eight thousand dollars in money, provided that the money should be invested in a plantation, which was done. The contract declared that all the property of said Sarah A. was to remain her sole estate until her marriage with said Gideon Dowse, and then should vest in said trustees in trust for the use and joint lives of her and her said husband, and should she survive him, to her in fee; but should she die before her said husband, leaving a child or children, or the issue of a child or children, then to said Gideon and them for their joint use until the eldest child became of age or married, when the estate was to be divided, share and share alike. And if the said Sarah A. should die before the said Gideon A., leaving no child or children or the issue thereof, then to Gideon A. in fee.

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The contract contained the following power: "That should a sale or exchange of any portion of said property be desired, it may take place by the written consent of the parties in interest, the proceeds of said sale to be vested in other property, to be held in trust, and upon the same limitations as are herein stated." It also provided that in case it should be necessary from the death or disability of one or both of said trustees, another or others might be appointed by Sarah A. and Gideon, or, if he refuse, by her alone.

The code of Georgia, sec. 2327, declares: "A trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the *corpus* of the estate; but such sale must be by virtue of an order of the court of chancery, upon a regular application to the same. Such application may be made to the judge in vacation, on full notice to all the parties in interest, and the order for such sale may be granted at chambers, the proceedings to be recorded as an application for appointment of trustees."

Relying upon this section of the code, in February, 1871, Robert J. Morrison, surviving trustee, Gideon Dowse for himself and as next friend for his wife Sarah A., Mary Low by her next friend, her husband, Samuel Dowse, and James Dowse, a minor, by his next friend, Samuel Dowse, "being all the parties in interest," presented, by Mr. Perry as attorney, a petition to the judge of the superior court of Burke county, for leave to mortgage the trust estate, stating, *inter alia*, that the management of the property was in charge of Gideon and Samuel Dowse; that provisions and money were necessary to carry on the farm and support the *cestuis que trust*, and they, being unable to procure such aid, under the laws of the state regulating trusts, pray the said judge to grant a decretal order authorizing the trustee to execute a mortgage deed to any proper person, merchant, factor or money lender, for such supplies, commercial manures, farming implements, or money—pledging said trust property to insure any debt created in such manner and for such consideration, the mortgage to comply in form and substance with the laws of this state, and to be valid in every intent and meaning thereof. That said Gideon and Samuel had wholly failed in their endeavor to procure supplies,

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money, etc., and that the only relief promised them had been made in view of the granting of a decretal order, and execution of a mortgage in accordance with the same. This "bill of complaint" was verified by Samuel Dowse, before the judge, on the 21st of February, 1871, and a copy of the marriage contract was annexed to it as an exhibit. On the same day, the judge granted the decretal order; which order, after reciting the substance of bill and marriage articles, concluded as follows: "It is, therefore, ordered and decreed that said Robert J. Morrison be, and he is hereby authorized and empowered to execute a mortgage deed to all or any part of said trust land as may be required, to any person who will furnish said trustee or his agent either with such necessities as the circumstances of the case require, or money to purchase the same, and that the mortgage so created shall be in every respect valid and binding upon said trustee, and shall attach to the land so conveyed until the debt is satisfied. It is further ordered that this proceeding constitute the records of the superior court of Burke county; provided, further, that the sum borrowed or amount furnished shall not exceed the amount or sum of \$2,000; and that a first lien be also taken upon the crop to be raised the present year to secure the same also."

In pursuance of this authority as it is claimed, Morrison, the trustee, executed a note for two thousand dollars to one Wilkins, which he signed "R. J. Morrison, trustee for S. A. Dowse and children," and to secure the same, executed a mortgage to Wilkins on the trust property, which he signed under the name and description of "R. J. Morrison, trustee." Wilkins transferred the note and mortgage before maturity to the complainant in this cause. The object and prayer of the bill was that the complainant might have a decree for the amount due on the said note, and that the mortgaged premises might be sold to pay the same.

Messrs. W. W. Montgomery and H. C. Cunningham, for complainant, argued that the authority of Morrison, the trustee, to execute the note and mortgage, was complete, and that even, if this authority were defective, the transfer of the note and mortgage to complainant as a *bona fide* holder before maturity cured any defect of authority for their execution, and made the note and mortgage binding on the trust estate.

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Messrs. R. E. Lester and T. M. Berrian, for defendants, relied, as a defense, upon the absence of authority in Morrison, the trustee, to execute the note and mortgage, and claimed that no such authority was contained in the ante nuptial contract, and that the superior court of Burke county had no power under the code of Georgia to confer such authority.

They further claimed that a trustee, unless expressly authorized, could not issue commercial paper to bind the trust estate, and the form on which the note and mortgage were executed put the transferee in inquiry, which, if followed up, would have shown that Morrison had no authority to execute them.

The cases cited by counsel are referred to in the opinion of the court.

ESKINE, District Judge. Two distinct views of this cause were presented by counsel for plaintiffs; and it was argued that the maintenance of either would warrant a decree for the plaintiff. First, that the power in the marriage articles, to sell or exchange any portion of the trust estate and reinvest the proceeds in other property upon the same limitations and trusts, conferred authority to execute a mortgage. Or, secondly, the authority to mortgage was valid under the decretal order of the chancellor by virtue of section 2327 of the code. In support of the first view, *Allan v. Backhouse*, 2 V. & B., 65, was relied on. There, the testatrix, after devising leasehold estates, held upon bishops leases for lives, and all her other real estate, to certain uses, directed the renewal of her leaseholds, and that the expenses should be raised out of the rents and profits of the leaseholds, or any part of the freehold estates, to the end that they might be enjoyed therewith as long as might be. The vice chancellor said, that the word "profits," *ex vi termini*, includes the whole interest, as a devise of the profits would pass the land itself. And he held, that as the purpose for which the money was to be raised out of the rents and profits might require it suddenly, for the lessors could not be expected to wait for the gradual payment out of the rents, and as there was nothing in the will to give these words the abridged sense of annual profits, except the purpose to preserve the estate entire, he warranted

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the sacrifice of part for the preservation of the remainder, and decreed that the gross sum for fines on renewal of leases, as well as to raise portions, might be raised by sale or mortgage, and thereby effect the purposes of the testatrix.

On perusing that case, it will there be found admitted, that the natural signification of the words "issues and profits" is annual "rents and profits." Yet the vice chancellor extended their meaning, "when applied," as he said, "to the object of raising a gross sum at a fixed time; when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." In *Bloomer v. Waldron*, 3 Hill, 361, COWEN, J., speaking of *Allen v. Backhouse*, called it "an extraordinary case." And in the late case of *Earl of Shaftesbury v. Duke of Marlborough*, 2 M. & K., 111, which was a trust to renew out of the "rents, issues and profits," it was held, by Sir JOHN LEACH, M. R., to be confined to annual rents, issues and profits, on the authority of *Stons v. Theed*, 2 Bro. C. C., 243, in opposition to *Allen v. Backhouse*.

They likewise relied on the case of *Wayne, Trustee, et al., v. Myddleton*, 2 Ga., 383. There, four slaves were conveyed in trust for the sole use of Mrs. P., and after her death, to her children; the deed gave her the power, with the consent of the trustee, to sell and dispose of the trust property, whenever she should deem it proper to do so, the proceeds to be reinvested upon like trusts. She purchased land and the growing crop thereon from one M., and hired his slaves to assist in the crop, and to secure the purchase money and the hire of the hands, she, with the consent of the trustee, made a mortgage on the trust property to M. The court held the power well executed, remarking, *inter alia*, that it "was a power without limitation, except that the property substituted for the slaves shall be covered with the same trusts." The decision was based upon the fact that the mortgage was given "for the purpose of acquiring, by purchase, other trust property to stand in the place of, and be substituted for the property mortgaged." Counsel also cited 4 Kent, 147-8, where the author, in speaking of powers of sale inserted in mortgages, says that "the better opinion would seem to be, that a power of sale for the purpose of raising money will

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imply a power to mortgage, which is a conditional sale." It is too evident to need citations, that the chancellor referred solely to mortgages at the common law, where the title passed to the mortgagee immediately on delivery of the conveyance in mortgage, the law investing the mortgagee with authority to sue out a writ of right or ejectment against the mortgagor in possession, even before condition broken. But in this state, a mortgage is not a conditional sale; it does not clothe the mortgagee with a power coupled with an interest, nor pass any estate; it creates a lien only, and the title remains in the mortgagor until foreclosure and sale. Code, sec. 1954; *Davis v. Anderson*, 1 Kelly, 176; *United States v. Athens Armory*, 35 Ga., 344; *Lockett v. Hill and another*, 1 Woods, 552.

But the chancellor, in his Lecture on Powers (4 Kent, 331), says: "As a general rule, a power to sell and convey does not confer a power to mortgage," and he cites 1 Sug. on Powers, 528; 2 Chance on Powers, 388. And here let it be inquired whether the power conferred by the marriage contract is an exception to the rule. The language is: "That should a sale or exchange of any portion of said property be desired, it may take place by the written consent of the parties in interest; and the proceeds from said sale to be vested in other property to be held in trust, and upon the same limitations as are herein stated." Some cases will now be referred to as illustrative of the rule: In *Haldenby v. Spofforth*, 1 Beav., 390, the power was "to make sale and dispose of the testator's lands by private sale or at auction;" and it was held by the master of the rolls, Lord Langdale, not to authorize a mortgage. He said: "I think that the clear and manifest intention of the testator was to have a sale out and out; to have a complete conversion of his real estate. * * * I think that the terms of this will do not authorize a mortgage, and therefore the mortgagee has not got a valid title."

In *Stroughil v. Anstey*, 1 De G., M. & G., a devise was to trustees, charged with debts, etc., with direction for, or trusts which require further, an out and out conversion; and the lord chancellor held that a mortgage was not a proper mode of raising the charges.

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In *Bloomer v. Waldron*, *supra*, the testator gave to his wife "full power to sell and convey all or any part of the real estate, provided A. B. shall consent to such sale, etc.; the moneys from such sales to be vested and secured in such manner as the said A. B. shall direct for the purposes of this my will." She executed a mortgage in fee to H. R., with the consent of A. B.; but the court decided that this was not a proper execution of the power, and declared the mortgage to be a nullity.

In *Coutant v. Servoss*, 3 Barb., 133, the deed conveyed lands to the grantee, in fee, in trust for the benefit of others, and conferred upon the grantee the power to grant, bargain, sell and convey the same, and to make and execute the necessary conveyances for the benefit of the *cestuis que trust*. The court held that these terms did not confer a power to mortgage. And citing *Bloomer v. Waldron*, and other authorities, the court said: "These cases are explicit that the power to sell, when, as in this case, it is general and unqualified, does not include the right to mortgage, and this is in accordance with the well known rule that powers should be construed strictly."

In *The Albany Insurance Company v. Bay*, 4 Comst. (N. Y. Court of Ap.), 9, S. had devised lands in trust, to trustees, with power to "sell and dispose of such parts, in fee simple or otherwise, as Mrs. T., the *cestui que trust*, by writing under her hand, should from time to time request and desire." The court (two of the eight judges dissenting, and apparently laying stress upon the word "otherwise") decided that the power did not include authority to execute a mortgage. See *Cummings v. Williamson*, 1 Sandf., 17; *Wood v. Goodridge*, 6 Cush., 117; *Hubbard v. German Cath. Cong.*, 34 Iowa, 31; *Head, Adm'r*, *v. Temple et al.*, 4 Heisk., 34; *Page v. Cooper*, 16 Beav., 400; *Devaynes v. Robinson*, 24 id., 86.

Viewed in the light of those principles which govern the interpretation of powers inserted in marriage settlements and other instruments, and applying the cases just cited to the power under consideration, and looking to the natural and obvious import of the words employed in creating the power to sell or exchange any portion of the property, and reinvest the proceeds arising from the sale in other property upon the same limita-

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tions, trusts, etc., it is, to my mind, manifest and put beyond question or doubt that it was not the intention of the settler to confer authority to mortgage the whole or any portion of the estate for any purpose. And I think the authorities well warrant the conclusion that "a trust for sale, with nothing to negative the settler's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage." Perry on Trusts, sec. 768, 1st ed.

Although the bill is framed solely on the alleged authority of the decretal order to the trustee, yet the discussion, no objection being interposed, was as prominent on the marriage settlement as on the order. And having ruled upon the settlement, I pass to section 2327 of the code, and the decretal order of the judge, upon which the decree must be based.

The arguments presented by counsel were, in substance: That the promissory note of February 21, 1871, for \$2,000, made by Morrison and payable to G. A. Wilkins, or order, on the 1st of January, 1872, and the mortgage on the trust estate of even date with the note, and given to secure the payment thereof were, at the same time, delivered to Wilkins, who, before maturity of the note, indorsed it and also assigned the mortgage to the plaintiff for value; that the note and mortgage are a valid and binding debt against, and a lien upon the trust property, the trustee having been judicially authorized to bind the estate by the decretal order of the judge, of February 21, 1871, rendered in accordance with the section of the code referred to.

It declares that "a trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the *corpus* of the trust estate, but such sales must be by virtue of an order of the court of chancery upon a regular application to the same. Such application may be made to the judge in vacation, on full notice to all the parties in interest, and the order for such sale may be granted at chambers," etc.

Counsel for defendants insisted that this section did not empower the judge of the superior court to authorize the trustee to execute the mortgage. For the plaintiff, it was urged that he did possess authority to decree the making of the mortgage;

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that in entertaining the application of the trustee and *cestuis que trust* for leave to mortgage the trust estate, he acted within the jurisdiction given by the section; that he had cognizance of the parties and the subject matter, and that the decretal order was, in all respects, a valid act, and binding on the estate. And possessing jurisdiction in the premises, as was contended, if the judge made an erroneous decree, still, that matter could not be questioned in this court. Such is the substance of the views presented by the respective counsel on this branch of the case.

Now, does the section in question really confer on the superior court or judge the jurisdiction claimed by the plaintiff—the power, under any circumstances, to authorize a trustee to mortgage trust property? If I comprehend the meaning and scope of the section, it is when no express authority is given by the instrument creating the trust, to the donee or trustee of the power, to sell or convey the *corpus* of the trust property, that the superior court or judge can act and order a sale. Then if this be so, this section, so far as the case before this court is concerned, has no application whatever, for the marriage settlement of 1843 expressly declares that should a sale or exchange of any portion of the trust property be desired, it may take place by the written consent of the parties in interest. So, unless the words in the section “to sell or convey the *corpus* of the trust estate,” when tested by the rules of interpretation, include authority to mortgage, the decretal order was, I think, unauthorized.

But it was contended for the plaintiff, that this court cannot question the construction given to this enactment by a state court, or in this particular case, by a state judge, unless the statute itself or its construction conflicts with the constitution or laws of the United States; that when a state court or judge expounds a state statute, such exposition becomes a rule binding on the national courts, and that if the decision of the superior court judge is incorrect, the state supreme court is the tribunal to review and revise it, and not the United States circuit court.

But this court does not claim any supervisory or appellate power over the state court or judge; it merely entertains jurisdiction of this suit because of the citizenship of the plaintiff; and being thus called on to administer a law of the state of

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Georgia, it will, if possible, follow the decision of the state judge. A state statute, when it appertains to rights and titles in things having a permanent locality, and a construction is placed upon it by the highest state court, becomes a rule of decision in the federal courts; but the rule does not apply to the construction of contracts. To which class section 2327 belongs is of no consequence here; for no part of it has ever been expounded by the supreme court of this state. Judiciary Act, sec. 34; *Van Bokelen v. City R. R. Co.*, 5 Blatch., 379; *Leffingwell v. Warren*, 2 Black, 599; *Williams v. Kirtland*, 13 Wall., 306.

The power prescribed in the section to sell or convey the *corpus* of the trust estate is, to my mind, susceptible of no other meaning than that the legislature intended to negative any authority to decree a mortgage. If this view is correct, then the word "sale," as there employed, is to be understood in its general legal sense: that a sale decreed by the court or judge means an out and out alienation, and not a sale subject to a charge, or conjoined with a defeasance. I am also of opinion that the term "convey," which is in signification and effect sufficient to answer the requisites of a grant at common law (*Patterson v. Cosneal*, 3 A. K. Marsh., 618), is there used as synonymous with "to sell." The language of the section or statute is "to sell or convey the *corpus* of the trust estate." As already remarked, a mortgage in Georgia passes no estate; the title remains in the mortgagor until subsequent foreclosure and sale. I may add, that when powers are derived under a legislative act, the mode and directions for the execution of these powers must be sought for in the act. And in support of the views here expressed, the cases cited on the power in the marriage settlement are referred to.

The right and title of the plaintiff in and to the two thousand dollar promissory note, and the mortgage given to secure it, will now be passed upon. Plaintiff relied upon *Carpenter v. Longan*, 16 Wall., 271, and *Taylor v. Page*, 6 Allen, 86. In the first case, the court held that where a negotiable note, secured by a mortgage, is transferred to a *bona fide* holder for value before maturity, and a bill is filed to foreclose the mortgage, no other nor further defenses are allowed as against the mortgage than would be allowed were the action on the note brought in a

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court of law. In the other case, a negotiable note secured by mortgage was given for the price of liquor sold in violation of law; and the court ruled that though the note and mortgage were void as between the original parties, it was valid in the hands of a *bona fide* indorsee for value, without notice of the illegal consideration. The presumption is, that the \$2,000 note was indorsed, and the mortgage transferred to the plaintiff by Wilkins while the note was under due. The transfer on the mortgage bears date prior to the maturity of the note. The note is signed "R. J. Morrison, trustee for S. A. Dowse and children;" the mortgage "R. J. Morrison, trustee," and it recites that it is made "in pursuance of a decretal order passed by William Gibson, as judge of the Augusta circuit, having jurisdiction in equity, passed on the 21st of February, eighteen hundred and seventy." And the mortgage deed is made "between Robert J. Morrison, trustee for Sarah A. Dowse and her children, of the first part, and Gilbert A. Wilkins of the second part."

In *Carpenter v. Longan*, the court said: "The assignment of the note under due raises the presumption of want of notice, and this presumption stands until overcome by sufficient proof. The case is a different one from what it would be if the mortgage stood alone, or the note was nonnegotiable." The promissory note given by Morrison to Wilkins, who indorsed it to the plaintiff, and for which the mortgage is intended to be collateral security, was a negotiable instrument; and though the words "trustee for S. A. Dowse and children" were appended to the name of the maker, they are mere *descriptio personarum*, and carry no power to bind the trust property, unless the marriage settlement, or the decretal order authorized him, as such trustee, to make and issue commercial paper binding on the trust estate. It will not, I suppose, seriously be said that such authority was conferred by the marriage settlement, or by the code, or that it could be by the decretal order. A trustee has no power to bind, *ex directo*, the trust estate by promissory notes or bills of exchange, though such acts may make him personally liable. Story on Prom. Notes, sec. 63, and cases there cited; *Lovelace v. Smith*, 39 Ga., 130. Still, it was contended that the rule laid down in *Carpenter v. Longan* and *Taylor v. Page*, controls this

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case; that as the plaintiff, the indorsee, acquired the note before it fell due, fairly, and for value, and without notice of any defect or infirmity in the instrument, the plaintiff holds it free from all equities and defenses existing between the antecedent parties. In those cases, the question for determination was not whether the notes bore marks of caution or carried defects on their face; but whether there was proof *dehors* the instruments themselves to impeach the holders' title and right to recover. In both cases the question was one of fact; here, the question is matter of law. In the case before this court, no proof, outside of the note itself, has been produced, therefore the presumption is that none exists; but there are *indicia* on its face—facts and circumstances accompanying it, sufficient to have put the plaintiff, whose agent Grafflin received the note and mortgage simultaneously from Wilkins, the indorser of the former and transferer of the latter, on guard and inquiry before acquiring dominion over the note. If the plaintiff mistook the law by supposing that the words "trustee for S. A. Dowse and children," added to the signature of Morrison, were potent to bind the trust property, such ignorance is a misfortune against which this court has no power to relieve.

It is ordered and decreed by the court that the bill be dismissed.

NORTHERN DISTRICT OF GEORGIA.

MARCH TERM, 1873.

NATHAN H. HAND VS. THE YAHOOOLA MINING COMPANY.

A default was set aside and judgment opened where defendant, by affidavit, excused his neglect in not making defense, and made it appear that he had a good defense, and offered to pay costs and plead *instanter*; the motion to set aside the default having been made at the term at which the judgment was rendered, and continued several terms without fault of defendant.

This cause was submitted on motion to open a judgment by default.

Mr. E. N. Broyles, for the motion.

Mr. L. E. Blackley, *contra*.

Woods, Circuit Judge. The declaration was filed on the 15th day of February, 1871, and summons was served in the same month. On the 10th of March, 1871, Printup & Forché, attorneys, filed for the defendant, the plea of the general issue, signing themselves as attorneys for defendant, and for the stockholders of the company. On March 22, 1871, the court struck said plea from the files, because said attorneys, on a rule to show their authority to appear for said company failed to do so, and on the ground that the stockholders could not be admitted to defend the suit, and the court refused to allow John A. Wimpey, another attorney of the court, to file a plea of the general issue for certain named stockholders, but said Wimpey did file the general issue, signing himself as attorney for the said company. This plea the court ignored as filed without authority, and on the same day, to wit: on the 22d day of March, 1871, plaintiff's counsel took a default and moved

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for a writ of inquiry, which was granted, and the jury returned a verdict for over \$50,000, on which final judgment was entered.

On the 9th of June, 1871, and during the same term and ten days before its end, the motion, now on hearing to set aside the default and open the judgment, was filed.

In the view we take of the case, it is unnecessary to consider whether the plea of the general issue, filed by Wimpey for the company, was properly stricken or not. We assume that the defendant was in default, and that judgment by default was properly taken. The question then, for decision is, Should the judgment be opened on the showing made by defendant?

The affidavit, filed in support of the motion, alleges as an excuse for the default in filing a plea to the merits that the plaintiff, who was the acting treasurer of said company and had control of its affairs up to March 13, 1871, colluded with one F. W. Hall, the then clerk of said company, they being the only officers of the company then residing in Georgia, and that they did all in their power to prevent the making of any defense to said action; that on the 13th of March, 1871, new officers were elected for the company, and that the new officers were unable to organize and provide for the defense of the suit until after the judgment by default had been taken.

The affidavit further declares that the defendant is not indebted to plaintiff upon the claim sued on, which is entirely unjust and unfounded.

The defendant, on making the motion to open the judgment, offered to pay all costs, to plead *instantly*, and to go to trial so that the plaintiff should not lose a term by the opening of the default.

The hearing of this motion has, without the fault of defendant, been delayed from time to time until now. It should therefore be considered as if brought to hearing on the day it was made.

We are clear in the opinion that the motion should be sustained.

It is almost a matter of course to open a default on an affidavit showing a meritorious defense, and excusing the neglect in not pleading within the rules, the defendant offering to pay costs

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and plead *instante*. 1 Tidd's Prac., 562, note, and 567; *Bennet v. Fuller*, 4 Johns., 486; *Davenport v. Ferris*, 6 Johns., 131; *Tallmadge v. Stockholm*, 14 Johns., 342.

Great injustice might be done the defendant by refusing this motion, and if loss comes to the plaintiff by opening the judgment at this late day, it is the consequence of his own neglect, for he might have had this motion disposed of and a new trial, at the same term at which he recovered his judgment by default.

The motion will be sustained on the payment by defendant of all costs made up to the date of filing the motion, and upon the condition that defendant plead *instante*.

AT CHAMBERS, DECEMBER, 1874, AND MAY, 1875.

SKIPWITH WILMER et al vs. THE ATLANTA & RICHMOND AIR
LINE RAILWAY COMPANY et al.

1. A railroad company having its residence and principal office at Atlanta, Ga., conveyed to trustees, by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, N. C., and other property to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed to pay either the interest or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same (or such part as might be necessary) at Atlanta to pay the sum in default. *Held* :

- (a) That on default made in the payment of interest, and a demand upon the trustees by the bondholders that they should take possession of the trust property, and a failure of the trustees to do so, the court, on a bill filed by the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.

- (b) Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts secured by the trust deed.

- (c) When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a

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sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.

(d) The circuit court of the United States for the northern district of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road and other property included in the deed of trust, whether within or without the state.

2. Two states may, by concurrent legislation, unite in creating the same corporate body.
3. Where a bill was filed, the prayer of which was, that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of and administer the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver appointed by this court in the case thus commenced: *Held*, that by these proceedings the court acquired constructive possession of the trust property, and that possession thereof, taken under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. (Per Woods, Circuit Judge.)
4. *Contra*. Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and, until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of co-ordinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced or process *in personam* was served. (Per BRADLEY, Circuit Justice.)

This was a cause in equity which was first heard at chambers in Savannah, on the 5th and 7th of December, 1874, by Woods, Circuit Judge, on the motion of complainants for the appointment of a receiver.

Messrs. A. T. Akerman and L. E. Bleckley, for the motion.
Messrs. P. L. Mynatt and H. H. Marshall, *contra*.

Woods, Circuit Judge. The complainants, Skipwith Wilmer and August Richard, allege that they are the owners and holders of certain of the bonds known as first mortgage eight per cent bonds of the Atlanta & Richmond Air Line Railway Company,

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which are secured by a deed of trust on all the property and franchises of the defendant company, and they file this bill in behalf of themselves and all other holders of similiar bonds who shall be entitled to avail themselves of the benefit of the suit. The purpose and prayer of the bill is, that the trust deed, given to secure said bonds, may be so construed that the trustees therein named, or their substitutes to be appointed by the court, may be compelled to execute the trusts created by the deed of trust, by taking possession of said railway and appurtenances, and all property granted by the deed of trust, and selling the same at public auction for the payment of the principal and interest of all the bonds secured by said trust deed, and that pending the suit, some suitable person may be appointed receiver to take possession of said railway and all its property conveyed by the trust deed, with power to operate and manage said railway, and receive all its earnings and income during the pendency of the suit, and with such other power as to the court shall seem right and proper.

The cause now comes on for hearing upon the motion of the complainants for the appointment of a receiver as prayed in the bill.

It is alleged in the bill that the defendant company is a corporation created by, and existing under the laws of the states of Georgia, South Carolina and North Carolina, and having its principal office and place of business in Atlanta, in the state of Georgia.

It further appears from the bill that, by an act of the legislature of Georgia, approved March 5, 1856, a railroad company, to be known as "The Georgia Air Line Railroad Company," was incorporated and authorized to build, equip and enjoy a railroad from Atlanta to the South Carolina state line, in the direction of Anderson court house.

By an act of the general assembly of South Carolina, approved December 20, 1856, the Air Line Railroad Company of South Carolina was incorporated, with authority to construct a railroad from the line of the state of Georgia, in the direction of the city of Atlanta, to Anderson court house, and thence to some point of connection with the Charlotte and South Carolina Railroad,

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in the direction of Charlotte, North Carolina, and to equip and enjoy the same.

The seventh section of this act of incorporation provides that it shall and may be lawful for the said company to combine or unite with any other railroad company having the right so to do, and to consolidate the management of the companies so combining, if they shall deem it necessary, and to make any regulations for the use of or combination of the interest or management of said roads as the public good may require, or to them may seem meet.

By an act of the legislature of North Carolina, approved August 3, 1868, it was provided that the Air Line Railroad Company in South Carolina was authorized "to extend, construct, equip, and operate its road within the limits of North Carolina, from any point on the South Carolina line to the town of Charlotte, in North Carolina."

These three acts being in force, the legislature of Georgia, by an act approved September 7, 1868, declared "that the Georgia Air Line Company be and they are hereby authorized to consolidate, combine, or unite with any other railroad company or companies directly or indirectly connecting therewith, or to unite the management of said companies, upon such terms, conditions, and provisions as shall be agreed upon by and between such companies so consolidated or uniting, and thereupon such consolidated or united companies shall be invested in this state with all the rights and privileges conferred upon, and be subject to all the restrictions imposed by, the original charter of the said Georgia Air Line Railroad Company, and the amendments thereto, with the right to adopt such other or modified corporate name, and to increase and diminish the number of directors now provided, or as shall be determined on and agreed upon by such companies." And the legislature of South Carolina, by an act approved September 18, 1868, entitled "an act to amend an act entitled an act to incorporate the Air Line Railroad Company in South Carolina," declared, sec. 2, "that if said company shall, as authorized by its charter, consolidate or unite with any other company or companies, it may adopt such other or modified corporate name and increase or diminish the number of directors

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now provided for as shall be deemed best and agreed upon by such companies."

In pursuance of the authority granted by these acts of the legislatures of Georgia and South Carolina, it is alleged that, on June 20, 1870, the Georgia Air Line Railroad Company, and the Air Line Railroad Company in South Carolina, by an agreement in writing, duly executed between said companies, were consolidated and united into one corporation under the name of the "Atlanta & Richmond Air Line Railway Company," and from thenceforward became one body corporate under that corporate name, and the owner of all the property and entitled to all the rights, privileges and franchises which had belonged to the two companies out of which it was formed.

It is further alleged that the Atlanta & Richmond Air Line Railway Company, having thus become the owner of all the property which had belonged to the two companies named, and being in need of a large sum of money to complete and equip its road, conveyed to trustees by deed of trust "the entire railway of said company, extending from the city of Atlanta, in the state of Georgia, to the city of Charlotte, in North Carolina, together with all its franchises, lands, buildings, machinery, rolling stock, materials and other property, real and personal, wherever situated, and however held, and whether now owned or hereafter acquired; and also the annually accruing net income of said company," the purpose of which said deed of trust, and it so declared, was to secure the payment of 4,248 coupon bonds of \$1,000 each, to be issued by the company, with interest payable semi-annually at the rate of eight per cent. per annum. It was made the duty of the trustees named in the deed of trust, upon default of payment of either the principal or interest of the bonds, to take possession of the trust property and its revenues and administer the same, and to sell the property or such part thereof as might be necessary to pay the sum of money in default. The bonds secured by the deed of trust were duly executed and issued and negotiated by the Atlanta & Richmond Air Line Railway Company.

The bill further states that on the 1st of January, 1874, the company made default in the payment of its interest that day.

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due, that the interest coupons were presented for payment at the offices of the company in New York and Atlanta, and payment thereof was refused. More than sixty days having elapsed from the time of such default, the complainants, together with the holders of other 2,342 of said bonds, gave notice to R. A. Lancaster and Alfred Austell, the surviving trustees under said deed of trust, of the default in the payment of interest, and requested them to proceed and execute the trusts created by said deed, and take possession of the trust property and the revenues of the company, as authorized and required by the deed of trust, to sell the property and apply the net proceeds of the entire trust property to the payment of the principal and interest on the bonds secured by said deed of trust, as therein provided. Although five months have elapsed since the said request, the trustees have taken no steps towards the execution of said trusts or the enforcement of the bondholders' rights under the deed of trust, but have utterly failed and neglected so to do.

It is further alleged that the Atlanta & Richmond Air Line Railway Company is managed not so much in the interest of its bondholders and stockholders as in the interests of the Richmond & Danville Railroad Company, whose president is also the president of the Atlanta & Richmond Air Line Railway Company: that it has been made subservient to the interests of the Richmond & Danville Company, greatly to its own injury and the damage of the complainants and other bondholders.

It is also alleged that the Richmond & Danville Railroad Company claims to have some interest in the property covered by the deed of trust, and to have a lien therefor on said property, and that the complainants apprehend that the Atlanta & Richmond Air Line Company, and the Danville & Richmond Company are acting collusively in regard to said lien, and that it is their intention to undertake to enforce it to the great wrong and injury of complainants and other bondholders.

It is unnecessary here to notice further the allegations of the bill. The motion is for the appointment of a receiver, to take possession of the entire line of the defendant company's road, running from Atlanta, Georgia, to Charlotte, North Carolina, over portions of three states..

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The first question which presents itself for solution is, Should there be a receiver for the property of the defendant company or any part of it?

The rules which govern the discretion of courts in the exercise of this power are well settled. Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere upon the application of any of the creditors, either in his own behalf or in behalf of himself and the other creditors, and, by the appointment of a receiver, or in some other mode, grant relief. *Jones v. Dougherty*, 10 Ga., 274. The appointment of a receiver is not necessarily predicated upon the apprehended loss of the debt. It would be sufficient to allege that the trustee appointed refused to perform the trust. *McDougal v. Dougherty*, 11 Ga., 586.

Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the *cestui que trust* is a matter of right. *Jenkins v. Jenkins*, 1 Paige Ch., 243.

The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance. 2 Redf. on R'ys, 361.

To apply these well settled rules to the question in hand: As already stated, the trustees have, for more than five months, neglected, although requested, and although the deed of trust made it their duty to do so, to take possession of the property of the defendant company. The bondholders have as clear a right to have executed that power of the trust deed, which requires the trustees to take possession of the property upon default in payment of interest as any other covenant in the deed. If the trustees refuse to perform this duty, the *cestui que trust* has the right to apply to the court to compel them to do it, or appoint some one who will. And this right is independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms.

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It has been made to appear upon the hearing that the interest for January and July last is in default, amounting to \$339,840. It is also shown that upon an execution issued on the judgment of a court of the state of Georgia for little more than \$1,000, the railroad of the defendant company has been sold piecemeal in the several counties of the state of Georgia through which it runs. It is also shown that since the filing of the bill and the service of process in this case, and since the allowance of a restraining order, a suit has been instituted in the superior court of Fulton county, Georgia, in which a receiver has been appointed for so much of the property of the defendant company as lies within the state of Georgia; that suits have been instituted in the United States circuit court for North Carolina, and in the United States circuit court for South Carolina since the service of process in this action, in which receivers have been appointed for the property of the company in these states respectively. It is true that the same person has been appointed receiver in North and South Carolina, but a different person is the receiver appointed by the state court in Georgia. Here are three distinct and independent courts claiming possession of different portions of the railroad and other property of the defendant company, and it is in the actual possession of two independent receivers, living in different states and accountable to different tribunals.

The averment of the bill is, that this railroad property from Atlanta, Georgia, to Charlotte, North Carolina, is one inseparably indivisible piece of property; that it is a portion of a great through route, and derives its chief value and business from that fact. The legislation already cited, of the three states through which it runs, shows that it was intended to be one undivided and unbroken line, and the deed of trust, which is the basis of this proceeding, covers the whole line of the road from one terminus to another.

It is obvious that it would be a most unfortunate case that such a property should be held by two different receivers, accountable to three different courts. In fact, when we consider that a large part of the property of the company consists of rolling stock, which must necessarily pass from one end of the road to the other, and which must be used on the three divisions into

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which the road is divided by its administration in three different courts, it appears to be well nigh impossible to administer the affairs of the road and render accurate and satisfactory accounts. It is evident that such a divided control must result in crippling the operations of the road, destroying its business and reducing its receipts, and placing in jeopardy the security of its creditors.

This unfortunate condition of affairs, resulting from the action of three independent courts, would of itself be, as it appears to us, sufficient ground for the appointment of a receiver for the entire property by this court, if the power and jurisdiction of this court to do so is clear.

First, then, Has this court the power to appoint a receiver for real property outside the limits of the state? Involved in this question is another, to wit: Is the Atlanta & Richmond Air Line Railway Company one corporation in Georgia, and another and distinct corporation of the same name in South Carolina, or is it the same corporate body in both states? It seems to me quite clear that the purpose of the legislation of Georgia and South Carolina, in reference to this corporation, already set out in this opinion, was to create a single corporate body. Pursuant to the provisions of the acts of these two states, the two original companies did consolidate and combine, they took a new name, and organized a new and single board of directors. Having done this, the new consolidated company, under its new name, and acting by its one president, has executed a single deed of trust, covering the entire line of railway from Atlanta to Charlotte, and including all the personal property, which formerly belonged to the two companies that united to form the new one. It is clear that the legislation of the two states was passed to authorize the making of one corporate body out of two, and that the two corporate bodies so authorized have united, and have, ever since the 20th of June, 1870, the date of the consolidation, been acting as one company.

The only remaining question in this branch of the inquiry is, Could the legislatures of two different states unite to create one corporate body? This question is distinctly answered by the supreme court of the United States in the case of *The Railroad Co. v. Harris*, 12 Wall., 82. The court says: "We see no reason

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why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several preëxisting corporations into a single one.

"The Philadelphia, Wilmington & Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland, Chief Justice TANEY, in delivering the opinion of this court, said: 'The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective states, were united together, and form one corporation under the name and style of The Philadelphia, Wilmington & Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore.'" We reach the conclusion then that the Atlanta & Richmond Air Line Railway Company is one and the same corporate body in Georgia and South Carolina, and the legislation of North Carolina hereinbefore referred to shows that it has the same rights and functions in that state that it has in South Carolina.

The bill avers, and the proof shows, that this corporate body, existing in two states and owning property in three, has its residence and principal office at Atlanta, Georgia.

The inquiry then recurs, Can this court, having obtained jurisdiction over the person of this corporate body, exercise jurisdiction over its real and personal property outside the limits of the state, by the appointment of a receiver to take possession of the entire property, both within and without the state?

There is a precedent for the exercise of such jurisdiction. In *Ellis v. The Boston, Hartford & Erie Railroad Co.*, 107 Mass., 1, the court appointed a receiver for the entire line of the defendant company's road, which extended from Boston, in Massachusetts, to Fishkill, in New York.

It is well settled that realty out of the state may be reached by acting on the person. *Mitchell v. Bunch*, 2 Paige Ch., 606; *Ramsey v. Brailsford*, 2 Dess., 587, note. In the case in Paige, it was held that if the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property situated without such jurisdiction.

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When the property is situated outside the territorial jurisdiction of the court, the court may require assignments to be made by the defendant to the receiver. *Chipman v. Sabbaton*, 7 Paige Ch., 47; *Cagger v. Howard*, 1 Barb. Ch., 369; Story on Conflict of Laws, § 463; *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 15 How., 243.

As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this court should not appoint a receiver for the whole, even though a part of the property may extend into another state. The court having jurisdiction of the defendant can compel it to do all in its power to put the receiver in possession of the entire property. If other persons outside the territorial jurisdiction of this court have seized the property of defendant, the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession, but that is no reason why we should hesitate to appoint a receiver for the whole property. We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of this court in possession.

Finally, it is objected that the superior court of Fulton county, Georgia, and the United States circuit courts of South Carolina and North Carolina, respectively, have taken jurisdiction of the property of the company within their respective states, and their receivers are in possession, and this court ought not to interfere by the appointment of a receiver of its own.

The record shows that the bill in this case asking this court to undertake the administration of this trust property, and to take possession of it by its receiver, was filed on the 30th of October, 1874. It is shown that service was made upon the defendant corporation on the 31st of the same month, and notice of the motion now on hearing was served on the same day.

It further appears that on the 5th of November, upon the application of the complainants, and upon the showing that there appeared to be danger of irreparable injury from delay, a judge of this court directed that, upon the execution of a bond by complainants with sufficient sureties in the sum of five thousand

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dollars, conditioned according to law, a restraining order issue enjoining and restraining the Atlanta & Richmond Air Line Railway Company, its officers and agents, from handing over or delivering possession of said railway or its appurtenances, or any of its other property, to any person except a receiver appointed by this court in this suit.

The bond was given by the complainants as required by the court, and the restraining order was issued, and on the 9th of November served on the Atlanta & Richmond Air Line Railway Company.

The case in Fulton superior court was not filed until November 10th, and no prayer was made for a receiver until Garner, a defendant in that case, applied for one in his answer, which was filed on November 20th. The suits in the United States circuit courts of South and North Carolina were not commenced until the 16th of November.

Upon this state of facts, which court first acquired jurisdiction of this trust property?

Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment it is not. In this case I think the jurisdiction of the United States circuit court for the northern district of Georgia first attached to the property, because the suit in that court was first commenced and service of subpoena made, and because,

1. One of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill, and

2. Because, by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause, the court acquired constructive possession, and from the moment of the service of the restraining order the property was *in gremio legis*. I think these positions are sustained by the authorities.

I subjoin a reference to a number of cases, in all of which the subject under consideration is discussed, and in some of which the precise point is decided and the views above expressed are sustained: *Smith v. McIver*, 9 Wheat., 532; *Wallace v. McCon-*

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nell, 13 Pet., 151; *Peck v. Jenness*, 7 How., 624; *Williams' Adm'r v. Benedict*, 8 How., 107; *Wiswell v. Sampson*, 14 id., 52; *Taylor v. Carryl*, 20 id., 583; *Green, Adm'r, v. Creighton*, 23 id., 90; *Freeman v. Howe*, 24 id., 457; *Chittenden v. Brewster*, 2 Wall., 191; *Memphis v. Dean*, 8 id., 64; *Taylor v. Taintor*, 16 id., 370; *New Orleans v. Steamship Co.*, 20 id., 392, 393; *Atlas Bank v. Nahant Bank*, 23 Pick., 489; *Wadleigh v. Veazie*, 3 Sumn., 165; *Ex parte Robinson*, 6 McL., 355; *Bell v. Ohio Life & Trust Co.*, 1 Biss., 260; *Bell v. The New Albany Railroad Co.*, 2 id., 390; *Parsons v. Lyman*, 5 Blatch., 170; *Stearns v. Stearns*, 16 Mass., 171; *Conover v. The Mayor*, 25 Barb., 513; *Clepper v. The State*, 4 Tex., 242; *Thompson v. Hill*, 3 Yerg., 167; *Bank v. Rutland Railroad Co.*, 28 Vt., 478; *Merrill v. Lake*, 16 Ohio, 405; *Ex parte Bushnell*, 8 Ohio St., 601; *State v. Yarbrough*, 1 Hawks, 78; *Gould v. Hays*, 19 Ala., 448; High on Rec., 38, 39, 40, 41, and note.

Especial attention is called to the cases of *Wiswell v. Sampson*, 14 How.; *Chittenden v. Brewster*, 2 Wall., and *Bell v. The New Albany Railroad Co.*, 2 Biss., *supra*.

An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process, or according to some of the cases the simple commencement of the suit by the filing of the bill is sufficient to give the court jurisdiction, to the exclusion of all other courts.

In this case, not only was the suit begun and process served before the commencement of any other suit, but the defendant railway company was actually enjoined by the order of this court from yielding possession of the trust property to any one except a receiver appointed by this court in this case.

In my judgment, this restraining order gave this court constructive possession of the trust property, and a subsequent seizure of the same by any person on the order of any court whatever, in a suit subsequently begun, was a contempt of the process and jurisdiction of this court.

If this court, upon the bill filed in this case, has the power to

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take possession of the entire property granted by the trust deed, as we have already decided it has, then the filing of the bill asking this court to take possession of and administer the trust property, and the service of process, excluded the jurisdiction of all other courts to take possession of and administer the same property or any part thereof.

Other questions than those noticed in this opinion have been argued at the bar, but it is not necessary to decide them in passing on this motion.

I am of opinion that this court has jurisdiction to appoint a receiver for the entire property covered by the trust deed, and to administer the property for the benefit of all persons interested in the trust; that the jurisdiction of this court over the entire trust property attached before that of any other court; that all parties necessary to the hearing of this motion are before the court; that the bill and the evidence submitted establish a proper case for the appointment of a receiver, and the facts brought to the knowledge of the court imperatively demand its intervention; the interest of all parties requires that our jurisdiction, being thus exclusive over the subject matter, should be exercised, and that the motion for the appointment of a receiver for the whole trust property should be sustained.

In pursuance of the foregoing opinion, the court on the 19th of December, 1874, appointed John H. Fisher, Esq., receiver for the entire property covered by the deed of trust executed by the Atlanta & Richmond Air Line Railway Company. Fisher gave bond, as required by the order of the court, but was unable to get possession of that part of the trust property lying in Georgia.

On the 24th of May, 1875, he applied to the United States circuit court, from which he received his appointment, then being held by Mr. Circuit Justice BRADLEY and Mr. District Judge ERSKINE, for a writ of assisiance to enable him to get possession of so much of the trust property as lay within the northern district of Georgia.

Upon this application the following opinion was delivered:
Messrs. A. T. Akerman and L. E. Bleckley, for the motion.
Messrs. P. L. Mynatt and N. J. Hammond, *contra*.

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BRADLEY, Circuit Justice. This is a bill filed on behalf of first mortgage bondholders of the Atlanta & Richmond Air Line Railway Company, praying for a sale of the railway and appurtenances, and for a receiver to take possession of the property pending the suit. A receiver, Mr. John H. Fisher, was appointed by Circuit Judge Woods, on the 9th of December last. On proceeding to take possession of the property, the receiver found a large and important portion of it, to wit: the depot and terminus in Atlanta, and the railway line in Fulton, and some other counties in Georgia, in the possession of one Lemuel P. Grant, as a receiver appointed by the superior court of Fulton county, a court of the state of Georgia having equity jurisdiction. Grant refused to surrender possession, and Fisher, under an advisory order of **ERSKINE**, District Judge, applied to the superior court of Fulton county for an order directing its receiver to surrender the property. This application was also refused. Fisher, the receiver appointed by this court, now applies by petition for a writ of assistance to put him in public possession of the property, and for an attachment as for a contempt against Grant, and other officials and directors of the railway company, for conspiring to keep the property out of the possession of the officers of this court. To this petition several answers have been filed by the parties implicated, and the question is thus presented whether this court can, and if it can, whether it will take the property in question out of the possession of a receiver appointed by a state court. Under ordinary circumstances, such a proposition would not be listened to for a moment. But the complainants and the receiver of this court rely on the special circumstances of the case as taking it out of the ordinary rule. Those circumstances may be briefly stated as follows:

The bill in this case was filed October 30, 1874, and a copy and notice of motion for injunction and receiver were served on the railroad company the next day. On the 5th of November, Judge **ERSKINE** granted a restraining order, which, on the 9th of the same month, was served on the company, and on Grant, then a director of the company, appointed on behalf of the city council of Atlanta, of which he was a member. On the 11th it was served on Buford, the president, and on Sage, the general

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superintendent, and was brought to the notice of Garner, a director. As before stated, the application for a receiver was not decided until the 9th of December, 1874.

Meantime other proceedings had taken place in the state courts, and especially in the superior court of Fulton county, which produced the complications that have arisen.

In December, 1866, one Samuel B. Hoyt recovered a judgment in the Fulton county court against the Georgia Air Line Railway Company, of which the Atlanta & Richmond Air Line Railway Company is the legal successor by change of name, for the sum of \$1,000 and costs, and *fieri facias* was duly issued under the laws of Georgia, not only in Fulton county, but Gwinnett, Habersham and Hall counties, and several levies were made on the railroad line in April, August and September, 1874, and the road was sold in distinct parcels to one William A. Russell. The sales were severally made in June, September and October, 1874. On the 5th of November, Russell transferred his interest to Garner, a director, as above stated, for the whole line of railroad in Fulton, Gwinnett, and Hall counties. Garner was put into possession by the sheriff on the 9th of November, 1874. On the next day, the 10th, the Atlanta & Richmond Air Line Railway Company, by its managing director, P. A. Welford, filed a bill in the superior court of Fulton county against Hoyt, the judgment creditor, Russell, the purchaser at sheriff's sale, Garner, the assignee, etc., to prevent their proceeding to take possession of the road. On the 20th of November, Garner filed a cross-bill in the same court, asking for the appointment of a receiver, which resulted in the appointment of Grant, on the 21st, and his taking possession on the 26th of the same month. Grant had resigned his position as director of the company on the 11th of November.

It thus appears that the bill in this court was filed before that in the superior court of Fulton county, but that a receiver was first appointed by that court, and that he was in possession when the appointment of receiver was made by this court. It also appears that the object of the two suits was different; in this court, it being the foreclosure of the mortgage and the sale of the property to satisfy the same, the possession sought being auxiliary

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to the main purpose; in the state court, the object was to set aside the proceedings and sale under the judgment of Hoyt, and to prevent Garner from keeping possession of the road. On the 2d of January, 1875, the complainants in this court filed an amended bill, making parties of Hoyt, Russell, Garner and Sage, and alleging that the proceedings in the superior court of Fulton county were collusive, and intended to frustrate the proceedings of this court.

But suppose that the allegations of the amended bill are true, can this court arrest proceedings in a state court on the ground of their collusiveness? Must not the state court itself be applied to? We cannot assume or entertain the proposition that the state court will not do justice in matters within its jurisdiction. We are bound to suppose that it will not allow a collusive use of its process to be made by parties, but that it will set aside and declare null all such fraudulent proceedings.

Then the question remains pure and simple, Does the priority of commencing suit in this court for the foreclosure and sale of the mortgaged premises give the court constructive possession of the property, so as to nullify the subsequent possession taken by the state court, the respective objects of the two suits being different?

It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases. Thus an action of debt on a bond, an action of ejectment on the mortgage given to secure it, and a bill in equity to foreclose the equity of redemption, may be pending at the same time unless prohibited by some statutory regulation. The land mortgaged may be seized in execution by the sheriff in an action at law, even while the ejectment or the bill to foreclose is pending. A bill to foreclose is a personal proceeding, although it has reference to a specific thing. Its object is to put an end to an existing equity, and to procure a sale of the mortgaged premises. Possession may be taken in the course of the proceeding, but until it is taken, can

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it be said that the property is sacred from the touch of other persons or courts?

The present case, then, is resolved to this: Had the Fulton county court power to appoint a receiver, and place him in charge of the property, whilst a bill to foreclose was pending in this court; or was it an interference with the jurisdiction of this court?

It is perfectly evident that the controversy before that court is a different one from the controversy before this court. There it is a question of the validity of a sale under execution, and of the possession given by the sheriff in pursuance thereof; and that question arises between the Atlanta & Richmond Railway Company and the assignee of the purchaser. Here it is a question of the rights of bondholders, under a mortgage given by the Atlanta & Richmond Air Line Railway Company and the company, and arising between the bondholders and the company, and its officers and employés.

The controversy not being the same, nor the parties the same, there is no conflict of jurisdiction as to the question or cause. But, inasmuch as both controversies have ultimate respect to the possession of the railroad of the Atlanta & Richmond Air Line Railway Company, there has arisen a conflict of jurisdiction as to the thing or subject matter. It is important to know, therefore, whether this court had jurisdiction over the subject matter, namely, the railroad, when taken possession of by the receiver of the Fulton county court, so as to make that taking an invasion of the jurisdiction and powers of this court. If it had, it will enforce that jurisdiction and assume the actual possession to which it gives the right. If it had not, then it will not interfere with the actual possession of the receiver of that court, though the rights represented by the litigants in this court be superior to those of both litigants in the state court, as those rights can be asserted when the possession of the state court has ceased. The reason that it will not interfere in such case is, that interference might create a collision between the two courts, which would be unseemly and contrary to the comity which should exist between them. The two courts are coördinate in jurisdiction, neither being superior to the other, and both being

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charged in the respective cases before them with the due administration of the laws of the state of Georgia.

The test I think is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased.

Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction.

The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We cannot take the property out its hands, unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied.

Our views may be somewhat variant from those of Judge Woods, as expressed by him when the receiver was appointed. That question was different from the one now before us, which relates to the powers of that receiver to interfere with the possession of a portion of the road, in the hands of another receiver. Our decision does not necessarily conflict with his order, although our views may differ from his as to the power of the receiver. And in differing from Judge Woods, we do so with much respect for his opinion. The question must be admitted to be one of some nicety; but we prefer that course which avoids collision with a state court when it coincides with our own convictions as to the law.

The authorities on the subject have been somewhat carefully consulted, especially the following: *Smith v. McIver*, 9 Wheat., 532; *Wallace v. McConnell*, 13 Pet., 151; *Williams v. Bene-*

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dict., 8 How., 111; *Hagan v. Lucas*, 10 Pet., 400; *Payne v. Drew*, 4 East, 538; *Taylor v. Carryl*, 20 How., 583; *Pulliam v. Osborne*, 17 id., 471; *Buck v. Colbath*, 3 Wall., 334; *Watson v. Jones*, 13 id., 679.

ERSKINE, District Judge, concurred.

AT CHAMBERS, MAY, 1875.

Ex parte DOCK BRIDGES.

1. Perjury committed in the course of a judicial investigation, conducted under authority of acts of congress, is an offense against the public justice of the United States, and is exclusively cognizable in the courts of the United States.
2. As a general rule of the common law, when it appears by the return to a writ of *habeas corpus*, that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after conviction, he will be at once returned to custody.
3. But this rule has been modified by several acts of congress, which are condensed into sec. 753, Rev. Stat., whereby the courts of the United States are authorized to issue the writ in behalf of any person restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States.
4. Therefore, a person who had been convicted in a state court for the offense mentioned in the first head note, and was undergoing imprisonment in the penitentiary therefor, was discharged on *habeas corpus* issued from a court of the United States.

This was an appeal from the decision on *habeas corpus* of ERSKINE, District Judge. The facts appear in the opinion of the court. .

Mr. H. P. Farrow, U. S. Attorney, and *Mr. G. S. Thomas*, Assistant U. S. Attorney, cited U. S. Rev. Stat., secs. 629, 753; 1 Whart. Crim. Law, 185-197; Bouvier, 533; U. S. Const., art. III, sec. 2; 2 Bish. Crim. Law, sec. 987; *The People v. Kelley*, 38 Cal., 145; *State v. Pike*, 15 N. H., 83; *State v. Adams*, 4 Blackf., 146.

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Mr. N. J. Hammond, Attorney General of Georgia, cited sec. 14, act of 1789, 1 Stat., 81; secs. 13 and 26, act of March 3, 1825, 4 Stat., 115; *Fox v. Ohio*, 5 How., 421; *Ex parte Cabrera*, 1 Wash., 232; *Ex parte Des Rochers*, 1 McAl., 68; *Ex parte Dorr*, 3 How., 103; *Norris v. Newton*, 5 McL., 92, 100; *United States v. Rector*, 5 McL., 174; *United States v. French*, 1 Gall., 1; *Ex parte Jenkins*, 2 Wall. Jr., 525; *Ex parte Watkins*, 3 Pet., 193; *People v. Kelley*, 38 Cal., 145. He argued, *inter alia*, that the *habeas corpus* act of February 5, 1867, 14 Stat., 385, was intended as an amendment to the act of 1789, *supra*; that it simply extended the power of the United States courts in *habeas corpus* to persons restrained of liberty in violation of the constitution or any treaty or laws of the United States. The terms of the act do not seem to apply to cases where final judgment has passed, and the party is imprisoned in execution of sentence, and, if it applies to any new case, this amendment nowhere repeals the proviso of sec. 14, act of 1789, 1 Stat., 82, and Mr. Brightly, under it, cites the case from McAllister's Reports, *supra*, as showing the limit to the authority of the United States courts. No clause in the constitution, or any law or treaty of the United is violated by the punishment of the prisoner for perjury by a state court.

BRADLEY, Circuit Judge. Dock Bridges was indicted in the superior court of Randolph county, Georgia, for perjury, committed October 22, 1874, in an examination before a United States commissioner, under the enforcement act. The offense, though set out according to its circumstances, was charged to have been committed against the laws of Georgia; but it was obvious that it was a crime against the laws of the United States only. It was perjury committed in the course of a judicial investigation under the acts of congress, and was an offense against the public justice of the United States. By the revised statutes of the United States, sec. 5,392, every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, willfully and contrary to said oath, states any material matter which he does not believe to be true, is guilty of

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perjury, and shall be punished by fine and imprisonment, prescribed by the act, and be thereafter incapable of giving testimony in any court of the United States.

Such an offense is exclusively cognizable in the courts of the United States. By sec. 629 of the revised statutes, it is declared that the circuit courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except when otherwise provided, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein; and by sec. 711, the jurisdiction vested in the courts of the United States, of all crimes and offenses cognizable under the authority of the United States, is declared to be exclusive of the courts of the several states.

The validity of these acts of congress is not questioned. It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty. And whilst certain offenses, involving breaches of the peace, counterfeiting the public money, etc., may be violations of both federal and state laws, and punishable under both, perjury in a judicial proceeding is peculiarly an offense against the system of laws under which the court is organized and proceeding. At all events, congress has declared that the courts of the United States shall have cognizance, exclusive of the state courts, of all crimes and offenses cognizable under its authority. Hence, it was clearly in violation of the laws of the United States for the state court to try and imprison the defendant for the crime in question. The court had no jurisdiction of the case. The proceedings were null and void.

It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a state court, his only remedy is to carry the judgment to the court of last resort, and thence by writ of error to the supreme court of the United States, and that it is too late for a *habeas corpus* to issue from a federal court in such a case. This might be so if the proceeding in the state court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall., 163.

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As a general rule, when it appears by a return to a *habeas corpus* that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after a conviction, he will be at once returned into custody, it being presumed that the court having such custody has examined, or will examine and lawfully determine the case; and, at all events, that its judgment will be subject to such regular proceeding for review as is provided by law.

In addition to this cautionary and conservative rule of the common law, the fourteenth section of the judiciary act of 1789 provided that the writ should in no case extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed for trial before some court of the same, or were necessary to be brought in to court to testify. 1 Stat., 82. This provision prevented its application to persons imprisoned under state process.

But this proviso has been greatly modified. The benefit of the writ may now be had by prisoners in jail, not only when in custody under authority of the United States, but in 1833, when the nullification proceedings were adopted in South Carolina, it was extended to those in custody for an act done in pursuance of a law of the United States, or of a judgment of any its courts. 4 Stat., 634. The primary object of this statute was to protect the revenue officers in carrying out the acts of congress.

In 1842, when the complications growing out of the McLeod case, and the Canada rebellion occurred, it was extended to foreigners acting under the authority and sanction of their own government. 5 Stat., 539. This was to prevent a single state, as was done by New York in that case, from interfering with our foreign relations.

In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, congress, by the act of February 5, 1867, extended the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States," and made it issuable by "the several courts of the United States, and the several justices and judges of said courts within their respective jurisdiction." 14 Stat., 385.

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The present case clearly belongs to the last category. The relator was certainly "restrained of his liberty in violation of a law of the United States." And although it may appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on *habeas corpus*, there seems to be no escape from the law. If it were a case in which the state court had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, the state court had not jurisdiction of the offense. It might, however, be a wise amendment of this law, to provide that in all cases after conviction, the party should be put to his writ of error to the supreme court of the United States.

The statutes above cited are condensed in section 753 of the revised statutes of the United States. They have had the effect greatly to enlarge the jurisdiction by *habeas corpus* in the courts of the United States since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under state authority, provided his imprisonment is contrary to the United States constitution or laws.

The order of discharge must be affirmed.

The prisoner was thereupon discharged, but was immediately arrested upon a bench warrant from the United States court in Savannah, whither he was sent.

NOTE.—The opinion in the above case having been written in much haste—from the pressure of business on the circuit—and the subject being one of great importance, the Circuit Justice has revised it for the purpose of presenting his views more clearly and explicitly, and as revised it is above given.

Hester vs. Baldwin.

SEPTEMBER TERM, 1875.

A. G. HESTER vs. JAMES J. BALDWIN.

1. Claims against a bankrupt can not, as a matter of course, be proven to bar his discharge on a date subsequent to the day fixed for the creditors to show cause against the discharge.
2. One of the three individuals composing a firm was adjudicated a bankrupt. One of the other members of the firm offered as proof of a claim in his favor against the bankrupt, evidence to show that the firm of which the bankrupt had been a member was indebted in certain specified amounts which still remained unpaid, insisting that such evidence established an indebtedness from the bankrupt to him to the amount of one third of said partnership debts. *Held*, that such proof was properly rejected as not tending to establish any claim against the bankrupt in favor of his copartner, unless accompanied by proof that the copartner setting up the claim had paid said partnership debts.

REVIEW of decree of the bankrupt court.

Messrs. B. H. Thrasher and A. M. Thrasher, for petitioner.
Mr. B. F. Abbott, *contra*.

WOODS, Circuit Judge. Shepherd, Baldwin & Co. was the name of a firm composed of J. M. Shepherd, James J. Baldwin and A. G. Hester.

Baldwin filed his voluntary petition and was adjudicated a bankrupt. On the 4th of September, 1874, the creditors of Baldwin were required to show cause why he should not be discharged. A. G. Hester, one of the members of the firm of Shepherd, Baldwin & Co., offered to file a large claim on account of the copartnership debts of Shepherd, Baldwin & Co.; that is, he claimed that Baldwin was indebted to him, because he, Hester, was liable jointly with Shepherd and Baldwin for the partnership debts of Shepherd, Baldwin & Co. The register refused to file the claim.

On a day subsequent to the 4th of November, that being the day on or before which the creditors were required to show cause, Hester offered to file two other claims of like character, which the register refused him permission to file, both on ac-

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count of the character of the claims and because the claims could not be proven in order to bar a discharge after the day upon which creditors were required to show cause against the discharge.

The question submitted to this court is, whether the action of the register and the decision of the district court which approved it was right.

In my judgment it was. There must be some liability on the part of the bankrupt to the creditor, before the latter can set up any claim. The fact that Shepherd, Baldwin & Co. were indebted did not make one of the partners the creditor of the others. The fact that one joint debtor may call upon his co-debtor for contribution does not make the one the debtor of the other, in any manner or degree, until the one setting up the liability has paid the debt. Until a partner pays the debt of the partnership, he has no claim, contingent or otherwise, against his copartners.

The proof of debt which Hester offered to file, merely set forth that the bankrupt, "at the time of filing his petition, was and still is indebted to the deponent (Hester) in the sum of \$6,700 on the following claims, growing out of the copartnership of Shepherd, Baldwin & Co., J. M. Shepherd, James J. Baldwin and Albert E. Hester composing the said firm: That James J. Baldwin is due deponent the one-third of each of the several sums due to divers persons by said firm, each copartner being equally interested and mutually bound for the payment of all the debts of said firm." Then follows a long list of the partnership debts, which had been paid neither by Hester nor any one else, but were still due and owing. The idea that the existence of these unpaid partnership debts made Hester the creditor of Baldwin is entirely untenable. Baldwin has the same ground to say that Hester is indebted to him for the one-third of the partnership debts as Hester has to set up a claim against Baldwin on account of the partnership debts. See *Sigsby v. Willis*, 3 B. R., 207.

I think the register and the district court were both right in their conclusions.

The petition of review must therefore be dismissed at petitioner's costs.

Turner vs. Edwards.

TURNER VS. EDWARDS.

(Before Woods and ERSKINE, JJ.)

A. pleaded to an action at law a matter which the court held to be a good defense, whereupon the suit was dismissed; but it was afterwards decided in another suit between other parties, by the court of last resort, that the defense so set up was not good: *Held*, that in a second action brought against A. for the same cause, he was not estopped by reason of his plea in the former case from setting up the statute of limitations as a defense, even though the bar of the statute had intervened since the dismissal of the first action.

This cause was heard on plaintiff's motion for new trial.

Mr. E. N. Broyles, for the motion.

Messrs. A. M. Speer and J. D. Stewart, *contra*.

WOODS, Circuit Judge. The case is as follows: The constitution of Georgia of 1868, sec. 18, par. 1, declares that "no court or officer shall have, nor shall the general assembly give, jurisdiction or authority to try or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof."

An act of the legislature of Georgia, passed March 16, 1869, declared, sec. 6: "That all actions upon contracts, express or implied, or upon any debt or liability whatsoever, due the public or a corporation or a private individual or individuals, which accrued prior to the 1st day of June, 1865, and are not now barred, shall be brought by January 1, 1870, or both the right and the right of action to enforce it shall be forever barred."

On the 26th of March, 1867, the plaintiff sued the defendant in the superior court of Henry county, Georgia, on a promissory note of the defendant, dated April 15, 1861, for \$625. The defendant pleaded that the consideration of the note was the purchase price of a slave, and when the case was put on trial at the October term, 1869, he testified to the truth of his plea. Thereupon the court decided that it was without jurisdiction to proceed further, and the plaintiff dismissed his case. Afterwards at the December term, 1871, the supreme court of the United States, in the case of *White v. Hart*, 13 Wall., 647, decided that the clause in the constitution of Georgia, above quoted, had no effect

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on a contract made previous to its adoption, even though the consideration of the contract was a slave.

At the time of the dismissal of the suit in the state court, the plaintiff was a citizen of Georgia. In September, 1870, he removed to the state of Texas and became a citizen of that state, and on April 17, 1872, he brought suit against the defendant in this court, on the same note. To this action the defendant pleaded the limitation of the act of March 16, 1869, above mentioned.

The plaintiff claimed that under the circumstances stated, the defendant was estopped from setting up the bar of that statute. The court refused to take this view, and the verdict went for the defendant. Solely upon the ground of the alleged error of the court in so refusing, the plaintiff now moves for a new trial.

We think there is no estoppel here. By setting up the plea of want of jurisdiction in the state court to give judgment on a note, the consideration of which was a slave, the defendant was doing what he had a right to do. That the consideration of the note was a slave was true; in addition to this fact the defendant simply stated in his plea the provision of the constitution of the state, which he conceived deprived the court of jurisdiction to try the case. There was no fraud in making this plea; and in afterwards setting up the bar of the statute to the suit, on the same note, the defendant was not "alleging or denying a fact contrary to his own previous action, allegation or denial;" nor "saying that to be false which by his means had once been accredited for the truth, and by his representations had led others to act." "The very meaning of estoppel is, when an admission is intended to lead, and does lead, the man with whom the party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction." *Herman on Estoppel*, 3, 8.

The conduct of the plaintiff does not bring him within any of the definitions of estoppel. He has only exercised his own legal rights, first, in pleading want of jurisdiction to the action in the state court, and second, in pleading the statute of limitations in this court. The plaintiff has at all times been at liberty to resort to his legal remedies. If he has been misled or injured, it

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is not by any fraudulent or unconscionable conduct of the defendant, but by the mistake of the state court in sustaining a plea insufficient in law. If the plaintiff was not satisfied with the decision of the state court, he had his remedy, and should have pursued it.

The question raised in this case has been substantially decided by the supreme court of this state in the case of *Harris v. Gray*, 49 Ga., 585, and in that opinion we concur. See also *Hudson v. Carey*, 11 Serg. & Rawle, 10.

Motion overruled.

ERSKINE, District Judge, concurred.

CHITTENDEN & CO. VS. DARDEN & HOLSTON.

1. Section 6 of the "Act to further the administration of justice" (17 Stat., 197; Rev. Stat., sec. 915) does not confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment.
2. The voluntary appearance of the defendant in a suit so commenced would cure the defect of jurisdiction, but service of summons made upon him *in invitum* while in the district would not.
3. The giving of a bond by a nonresident defendant for the release of property seized by process of foreign attachment, issued from a United States court, is not a voluntary appearance, and does not give the court jurisdiction.
4. Commissioners of the circuit courts of the United States have not, by statute, any power to issue writs of attachment returnable to said courts.

The plaintiffs were citizens of New York, and the defendants citizens of Alabama. The action was commenced by a writ of attachment issued by a commissioner of the United States circuit court, on Nov. 23, 1874, which was levied on a stock of goods and other property of the defendants in West Point, Georgia, which is within this district. After the attachment was levied, the defendants, who, upon February 17, 1875, happened to be found by the marshal in West Point, within the district, acknowledged service of a notice provided for by section 3309 of the code of Georgia. This section declares that "the plaintiff, his agent or attorney at law, may give notice in writing to the

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defendant of the pendency of such attachment and of the proceedings thereon, which shall be served personally on the defendant by the sheriff * * * at least ten days before final judgment on said attachment; * * which being done, the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law."

After the service of the notice provided for by the section just quoted, the defendants, under section 3319 of the code of Georgia, gave bond with security, payable to the plaintiffs in attachment, binding themselves to pay them the amount of the judgment and costs they might recover in the case; whereupon, the property attached was delivered to them.

The defendants moved to quash the attachment and to dismiss the cause, because the court was without jurisdiction in the premises.

Mr. E. N. Broyles, for the motion.

Mr. Geo. Hillyer, *contra*.

Woods, Circuit Judge. The theory of defendants is, that as neither plaintiffs nor defendants were citizens of the state of Georgia, and the defendants were not found within the district by service of process *in personam* at the commencement of the suit, the proceeding by attachment will not hold; in other words, that the United States courts have no jurisdiction to institute suits by the process of foreign attachment.

Unquestionably this was true under that provision of the judiciary act (1 Stat., 79, sec. 11) which declares, "that no civil suit shall be brought in either of said courts, district or circuit, against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ."

In the case of *Toland v. Sprague*, 12 Pet., 300, the supreme court, having this subject under consideration, *held*, (1) That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. (2) That independently of positive legislation, the process can only be served upon persons within the same districts. (3) That the acts of congress adopting the state process adopt the

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form and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. (4) That the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court, and even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as part of or together with process to be served on his person.

The same doctrine had been previously held by the United States circuit court for the district of Massachusetts, in the case of *Piquet v. Swan*, 5 Mason, 35.

The decision of the supreme court above cited settles the question in hand against the plaintiffs, unless it has been affected by subsequent legislation. It is claimed that this has been done by the 6th section of the act "to further the administration of justice," passed June 1, 1872 (17 Stat., 197; Rev. Stat., sec. 915), which declares that "in common law causes in the circuit and district courts, the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, which are now provided for by the laws of the state in which the court is held, applicable to the courts of such state."

It is claimed that this enactment repeals, by implication, the provision in the 11th section of the judiciary act above quoted.

I do not think it was the purpose of the act of 1872 to enlarge the jurisdiction of the United States courts, by allowing them to issue writs of foreign attachment, and thus acquire jurisdiction over inhabitants of the United States in districts other than those wherein they resided or were found at the time of serving the writ.

The policy to require the suit against an inhabitant of the United States to be brought in the district where he resided or was found had been continued without interruption since the passing of the judiciary act of 1789, and it is reasonable to suppose that if congress contemplated a change in that policy, it would have made it clear and not left it to implication. That it was not the purpose of congress to change this policy is made evident by the enactment of secs. 738 and 739 of the revised statutes of the United

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States (Rev. Stat., pp. 139, 140). Section 738 provides that when any defendant to a suit in equity to enforce any legal or equitable lien or claim against him is not an inhabitant of or found within the district, and does not voluntarily appear thereto, he may be brought in by publication.

Section 739 reenacts the 11th section of the act of 1789, *supra*, by declaring that except in the cases provided by the preceding section (738) and in the two succeeding sections (740, 741), no civil suit shall be brought in either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he is found at the time of serving the writ. The two succeeding sections referred to only provide for service of original process in certain cases where there are two districts in the same state. As the case of a foreign attachment does not come within either of the exceptions mentioned in sec. 739, it must fall under the prohibition of the body of the section.

It is true that the 6th section of the act of 1872 is reenacted by section 915, Rev. Stat. But this section, and the section just quoted, must be construed together, and to give section 739 effect, section 915 must be held to apply only to cases of attachment when process *in personam* has been properly served on the defendant.

I am of opinion, therefore, that there was no authority to issue the writ of attachment in this case. But it is said that notice of the attachment, and of the proceedings thereunder, which, by the law of Georgia, is equivalent to a summons, has been served on the defendant within the district, and that therefore the attachment will hold. I have no doubt that the voluntary appearance of the defendant to the suit would cure the want of personal service. Indeed, it has been expressly held in *Toland v. Sprague*, *supra*, that where a defendant, who was not within the district when process of foreign attachment issued, afterward appeared and pleaded to the merits, the judgment is valid. But is this true when there is no voluntary appearance, but the defendant is caught within the district and served against his will? Can a plaintiff issue a writ of foreign attachment and seize the property of a person not an inhabitant of a district where the suit is

brought, and not personally served within the district, and when the latter comes into the district to recover possession of his property by giving bond, or for any other purpose, serve him with summons, and thus bring him into court against his will?

It seems to me, that to allow this, would be to sanction an abuse of the process of the court. The right of a citizen to be sued by original process in the district only where he resides, or in which he shall be found, is a substantial right, of which he ought not to be deprived by any artifice. In my judgment, no writ of attachment can be served on the property of a nonresident until he has been found within the district and served with process *in personam*. The attachment must follow personal service, or at least be contemporaneous with it.

I am therefore of opinion that the service upon the defendants, by the marshal, of the notice of the proceedings in attachment, was ineffectual to bring them into court or cure the defect of jurisdiction.

If what has just been said is true, it follows that the fact that defendants gave bond in pursuance of the Georgia code for the release of the attached property does not amount to the voluntary appearance of the defendants, nor give the court jurisdiction over their persons.

I am therefore of opinion that the motion to quash the attachment must prevail.

The question has been raised in the case, whether a commissioner of the circuit court has power to issue the writ of attachment.

The power is claimed for this officer on the ground that by the code of Georgia an attachment may be issued by justices of the peace, returnable to their own, and in certain cases, to the superior courts of the county. Code, sec. 457.

It is insisted, that as sec. 915 of the revised statutes provides that in common law cases, the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, which are provided by the laws of the state where this court is held, and as under the law of Georgia, a justice of the peace may issue an attachment against the property of defendants, it follows by analogy that the same power is possessed by commissioners of the circuit courts.

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I think this is stretching too far the interpretation of sec. 915, Rev. Stat.

Commissioners can only exercise powers expressly conferred. Sec. 627 of the revised statutes provides for the appointment of commissioners, and declares that they shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts. Many powers are expressly conferred on the commissioners of the circuit courts. See Rev. Stat., secs. 945, 727, 1014, 1778, 2025, 2026, 5076. But the power to issue process for the circuit courts is nowhere conferred upon the commissioners, and they can be considered to have such power only by the faintest implication.

I think sec. 716 of the revised statutes, excludes the idea that any such power resides in a circuit court commissioner. That section declares that: "The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*, and to issue all writs not specifically provided for by the statute, which may be necessary for the exercise of their respective jurisdictions and agreeably to the usages and principles of law."

Here the power to issue process, is conferred on the courts alone, and the idea that a commissioner possesses this power is plainly excluded.

Whether the circuit court could confer the power to issue attachments upon its commissioners is a question we are not now required to decide. It is sufficient for this case to say that no such power has been conferred on its commissioners by this court.

On all grounds, therefore, I am of opinion that the writ of attachment was improvidently issued, and that it must be quashed and the case dismissed.

Johnson's Assignee vs. Patterson's Assignee.

JOHNSON'S ASSIGNEE VS. PATTERSON'S ASSIGNEE.

1. A mortgage of chattels with possession and power of sale in the mortgagor is absolutely void.
2. This rule has been changed in Georgia by a statute which provides that a mortgage "may cover a stock of goods or other things in bulk, but changing in specifics; in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." The same statute declares that mortgages "must be recorded within three months from their date," but "mortgages not recorded within the time required remain valid as to the mortgagor, and are only postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage." Under these enactments, it was held, that when a mortgage was given on a stock of goods, and was not recorded for more than seven months, and the mortgagor remained in possession, and continued to sell off the stock and replenish it with new purchases, the mortgage was good as against general creditors of the mortgagor who had no notice of the mortgage, even though their claims were for goods sold to the mortgagor since the date of the mortgage, and before its registration, and the goods so sold formed a part of the mortgagor's stock.

This was a petition, filed under the second section of the bankrupt act, to review and reverse an order of the district court sitting in bankruptcy.

Messrs. Benj. F. Abbott and E. W. Beck, for petitioners.

Messrs. C. Peebles and E. P. Howell, for defendants.

Woods, Circuit Judge. The facts are as follows: On February 13, 1873, Patterson made and delivered to Johnson his two promissory notes of that date for \$8,000 each, due respectively on the first days of October and November next following, and at the same time placed in the hands of Johnson planters' bonds to an amount exceeding \$6,000, with the promise that afterwards the bonds were to be returned, and a mortgage of his stock of goods was to be made by Patterson to Johnson, to secure the notes.

This agreement was carried out by the execution and delivery by Patterson to Johnson, on March 27, 1873, of a chattel mortgage of that date, upon all the goods, wares, merchandise, accounts, notes and other effects belonging to the store of Patterson, conditioned for the payment of said two notes for \$8,000 each. Patterson retained possession of the stock of goods and the notes and

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accounts, and continued to sell the goods and collect the notes and accounts just as if no mortgage had been made. As he made sales of goods, he replenished his stock with other goods. In short, he continued his business precisely as he had done before the mortgage was executed. No record was made of the mortgage until November 12, 1873. On December 4, 1873, Patterson was adjudged a bankrupt.

After the execution of the mortgage, and before its record, Patterson contracted debts to the amount of \$11,171. These debts were for goods to replenish his stock.

After all this, Johnson, the payee of the notes made by Patterson, also went into bankruptcy. The assignee of Patterson sold the goods and other property covered by the mortgage, and the money is now in the registry of the court. The contest in this case is between the assignee of Johnson, who claims that this fund should be first applied to the payment of the notes for \$3,000 each held by him; and the assignee of Patterson who claims that the mortgage was ineffectual and that the proceeds of the mortgaged property should be distributed among all the creditors of Patterson *pro rata*.

To one unacquainted with the statute law of this state, this case would present no difficulty whatever. The general rule is, that a chattel mortgage, with possession left in the mortgagor, and power of sale, is fraudulent and void. *In re Kahley*, 2 Biss., 383; *Harvey v. Crane*, 2 id., 496; *Hawkins v. First Nat. Bank of Hastings*, 1 Dill., 462; *In re Manly*, 2 Bond, 261.

The code of Georgia, however, has this provision: "Sec. 1954. A mortgage in this state * * may embrace all property in possession, or to which the mortgagor has the right of possession at the time, or may cover a stock of goods or other things in bulk, but changing in specifics, in which case, the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." In the case of *Goodrich v. Williams*, 50 Ga., 425, the supreme court of this state construed this statute, and declared that "a mortgage upon a stock of goods then on hand, and upon the additional purchases as they should be made, is a good lien under our laws to the amount of the goods on hand at the time, and is

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good upon future purchases to that extent, even if those purchases be unpaid for, except as against any legal liens or title that may be against the goods in the hands of a third person." Therefore, if the mortgage had been recorded according to law, we should, under this provision, be constrained to hold it good, notwithstanding the mortgagor was allowed the power of sale.

But the mortgage was not recorded according to law. Section 1955 of the Code of Georgia declares that a mortgage must be "recorded within three months from its date." This mortgage was not recorded till seven months and a half after its date, and in the meantime, Patterson contracted the debts which are now represented by his assignee, who claims that, as to these debts, the mortgage is void.

But the assignee of Johnson claims that under section 1953 of the code of Georgia, "mortgages not recorded within the time required remain valid as to the mortgagor," and are only "postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage;" and as the general creditors of Patterson have no lien and are not purchasers, the mortgage is good as against them. Such seems to be the law of this state. It is so positively enacted, and has been so construed by the supreme court of the state as to give it this effect.

In *Hardway v. Semmes*, 24 Ga., 305, it was held that "if a mortgagee does not record his mortgage in three months, he risks having it postponed to after made mortgages, and to judgments obtained before he foreclosed it, but that is all he risks." The same doctrine, substantially, has been held elsewhere.

In *Cragin v. Carmichael*, 2 Dill., 519, it was held that under the laws of Iowa, the assignee in bankruptcy, in assailing a mortgage which was recorded at the time of the commencement of proceedings in bankruptcy, must show something more than that debts were created without notice of it before it was recorded.

It seems to me that there can be no doubt that under the law of this state, this mortgage, although unrecorded, was valid as against all persons except those who had obtained liens upon or become purchasers of the mortgaged property prior to the actual record of the mortgage. There are no such persons. All the

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creditors represented by Johnson's assignee are general creditors, without lien.

If the mortgage is valid under the state law, it is valid to the same extent under the bankrupt act. *In re Griffiths*, Lowell's Dec., 431; *Potter et al. v. Coggeshall*, 4 B. R., 73; *In re Dow*, 6 id., 10; *In re Wynn*, 4 id., 23.

Section 14 of the bankrupt act (Rev. Stat., sec. 5052) declares that "no mortgage of any vessel or of any other goods or chattels, made as a security for any debt in good faith, and for a present consideration, and otherwise valid, and duly recorded pursuant to any statute of the United States or of any state, shall be invalidated or affected by any assignment in bankruptcy." This section has uniformly been construed not to affect any mortgage good under the laws of the state where executed.

"This provision cannot enlarge the rights or title of the assignee, or make a mortgage invalid against him which but for the provision would have been valid. It appears to have been inserted out of greater caution, lest it should be supposed that valid chattel mortgages would be affected by the assignment, and not with any view of construing the laws regarding record; and so if the mortgage be one that requires no record, or if it be executed in a state having no record, or if record is not required between the parties, the provision will not defeat it." *In re Griffiths*, Lowell's Dec., *supra*.

In my judgment, therefore, as the mortgage in question in this case is good by the law of Georgia as against the mortgagor and against all others who had not acquired liens or become purchasers before the actual record, in spite of the fact that the mortgage was not recorded and that the mortgagor remained in possession with power of sale, I must hold it to be good as against the assignee of the mortgagor and the general creditors whom he represents.

Decree of district court reversed.

Wilmer vs. The Atlanta & Richmond Air Line Railway Company.

SKIPWITH WILMER VS. THE ATLANTA & RICHMOND AIR LINE
RAILWAY COMPANY et al.

1. Where certain bondholders whose bonds were secured by a deed of trust filed in behalf of themselves and all other bondholders whose bonds were secured by the same deed, who chose to come in as complainants and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered and the trust property sold and its proceeds distributed, and the other bondholders were numerous and some of them unknown: *Held*, that it was not a valid objection to the making of a decree in accordance with the prayer of the bill, that all the bondholders were not made actual parties; they might be allowed to come in as complainants, or might propound their claims before the master.
2. A trust deed, executed by a railroad company to secure bondholders, construed.
3. Where a railway is conveyed by a trust deed or mortgage to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold before the principal is due, on default in the payment of interest.
4. If two railroad corporations, created by different states, join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust in the district where one of the corporations resides, and it is served with process, and the other corporation, being a nonresident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court.
5. The Atlanta & Richmond Air Line Railway Company conveyed to trustees by a single deed all its line of road extending from Atlanta, Georgia, through South Carolina to Charlotte, North Carolina, to secure the payment of a series of bonds issued by the railway company, and the railroad was an indivisible and inseparable piece of property which could not be divided without injury to its value: *Held*, that the court had jurisdiction to decree that the trustees should sell the entire line of road, according to the terms of the trust, notwithstanding a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole property.
6. Penalty of bond for appeal fixed under rule 32 of the supreme court.

See *Wilmer v. The Atlanta & Richmond Air Line Railway Co. et al*, ante, p. 409. Before the final hearing, the receiver appointed by this court succeeded in obtaining possession of so much of the trust property as lay within the state of Georgia without the aid of the court.

At the September term, 1875, the cause came on for final hearing before Woods, Circuit Judge, upon the pleadings, evi

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dence and report of the master. In the meantime, Mr. L. E. Bleckley, who was originally of counsel for complainants, had been appointed a judge of the supreme court of Georgia. His place was supplied by Mr. H. R. McCay.

The cause was argued by *Messrs. McCay, A. T. Akerman and O. A. Lochrane*, for complainants, with whom appeared *Mr. P. H. Butler*, of New York, as of counsel, and by *Messrs. H. H. Marshall, John Collier and P. L. Mynatt*, for defendants.

Woods, Circuit Judge. The substance of the bill having been stated in the opinion given in this case upon the motion for the appointment of a receiver, *ante*, p. 409, it is unnecessary here to recapitulate its averments.

The company known as The Atlanta & Richmond Air Line Railway Company, and the same which is made defendant to the bill of complaint, answers the bill and admits the averments thereof as to the legislation of Georgia, South Carolina and North Carolina; admits the union of the said "Georgia Air Line Railroad Company" and "The Air Line Railroad Company in South Carolina," under the corporate name of The Atlanta & Richmond Air Line Railway Company, which is the name of this defendant, and that this defendant now possesses and has since said union possessed all the property of the said two railroad companies, including the line of road extending from Atlanta, in Georgia, to Charlotte, in North Carolina. The defendant company exhibits what it calls the agreement of union or consolidation, and prays that it may be taken as a part of its answer.

The answer of the defendant company also admits that, under the name of The Atlanta & Richmond Air Line Railway Company, it issued the bonds mentioned in the bill, and to secure the same, principal and interest, executed upon its entire property and line of road extending from Atlanta to Charlotte, the deed of trust mentioned in the bill of complaint, and a copy of which is appended thereto as an exhibit.

The answer of the defendant company further admits the averments of the bill to the effect that "said railroad with all its appurtenances is in the nature of an entirety; that it constitutes

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one and a continuous line of railway from Atlanta to Charlotte; that its unity and continuity are the most important elements of its value, and that to separate it from its appurtenances, or those from it, or any part from any other part, would greatly impair the whole."

Answers have been filed to the bill by the trustees, Anstill and Lancaster, admitting generally its averments.

An amendment has been filed to the bill making Samuel B. Hoyt, Wm. A. Russell, B. Y. Sage and T. S. Garner parties defendant, and making certain allegations and charges against them which it is unnecessary, particularly, to state. These new defendants have also answered the bill.

The Richmond & Danville Railroad Company and the United States Security Company were also made defendants, and it was alleged that they claimed to have some lien upon the property of the defendant railroad company, but that the same was inferior to the lien of the complainants. A decree *pro confesso* has been taken against these last named defendants for want of an answer.

At the March term, 1875, of this court, Julius M. Patton was appointed a special master to report, among other things, the number, character and description of the outstanding bonds of the defendant, the Atlanta & Richmond Air Line Railway Company, the amount of interest due on the same, the names of the present holders, and description of the bonds held by each.

The master has filed his report, in which he states that 4,248 first mortgage bonds of \$1,000 each were issued and negotiated by the Atlanta & Richmond Air Line Railway Company. He reports that twenty-one of these bonds are held and owned by the complainants Wilmer and Richard, 4,095 by other persons, whose names and the number held by each he gives. All these bonds were presented to and counted by the master. On the first day of July, 1875, there was due for interest on the 4,116, so presented to and reported by the master, the sum of \$658,565, not including any interest on the coupons due and unpaid.

This report was filed on the 16th day of August, and has not been excepted to.

The complainants produce the original deed of trust, and the

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report of the master, and pray for a decree, declaring that by the true construction and intent of said deed of trust the trustees therein named have the right and power, and it is their duty under the facts set forth in the bill, to take possession of the entire trust property and sell the same for the purpose of paying off the principal as well as the interest of the bonds thereby secured, and that they may be compelled to execute said trust accordingly, and according to the directions of the deed of trust, by taking possession of and selling all the property covered thereby, at public outcry, in the city of Atlanta, for the purpose of paying off both the principal and interest of said bonds.

Objection is made to any such decree by the Atlanta & Richmond Air Line Railway Company, and other defendants.

1. It is objected that the decree moved for cannot be made until all the persons entitled to participate in the fund raised from the sale of the property are made parties to the proceedings, and that such persons so interested have not yet been made parties.

The answer to the objection is found in the 84th equity rule, which provides: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants, in the suit properly before it. But in such case the decree shall be without prejudice to the rights and claims of the absent parties."

This case is the very one provided for by this rule. Here are four thousand bonds payable to bearer, secured by the deed of trust, to enforce which is the purpose of the suit. Necessarily the parties interested in the fund to be recovered by a sale must be very numerous, and many of them must be unknown. To require all of them to be made actual parties, and in case of the death of any, that the suit should be revived in the name of the personal representative of the deceased party before any final decree could be rendered, would be to deny the bondholders any relief in this court. The course and practice of courts of equity

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are not so exacting and oppressive. The rule and the general equity practice provide that the case may proceed when the court has sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants. There is no complaint here that any interest except that of the bondholders who are not parties is not represented.

But the interests of all the bondholders are represented: 1st by those who are actual parties complainant; and 2d by the trustees of the trust deed who are made the defendants. The trustees were expressly appointed to represent the bondholders, and if the suit had been brought by them, it would not have been necessary to make all the bondholders complainants or defendants. The course is to file the bill in behalf of all who choose to come in as complainants and bear their share of the costs of the suit, or allow them to propound their claims and interest before the master. 2 Redfield on the Law of Railways, 486; 2 Redfield's Am. R'y Cas., 692, 630; *Campbell v. The Railroad Co.*, 1 Woods, 368.

This has been the course pursued in this case, and I am clear that all the parties necessary to the decree asked are before the court:

2. The next objection to the decree prayed for is, that there can be no sale of the trust property or any part of it, to pay either the principal or interest of the bonds, until the year 1900, when the principal of all the bonds is due.

One of the solicitors for the defendants, however, admits that there may be a decree for interest in default and a sale of so much of the property covered by the deed of trust as is necessary to pay the interest due, but insists that no more can be sold.

The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest, until the year 1900. Here are bonds to the amount of \$4,248,000, bearing eight per cent. interest, payable semi-annually, and due as to principal in thirty years. The property covered by the deed of trust to secure these bonds is not estimated to have cost over \$7,000,000. If no interest were paid until the maturity of the bonds, the principal and interest would then amount to over \$20,000,000, calculating interest on the

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coupons as they mature. For this vast sum the bondholders would have a security on property which only cost \$7,000,000. In the mean time, during nearly the life of a generation, the railway company would hold the money of the bondholders, and, although it had agreed to pay interest semi-annually, could refuse to comply with its contract, and the bondholder would be without any effectual remedy. I do not believe there is a railroad company so bold, as to ask a loan of money on a deed of trust which could bear such a construction, or a capitalist so foolish as to grant the loan.

There are certain expressions in the deed of trust which give some faint color to the theory under consideration, but there are other clauses which indicate a contrary purpose most unmistakably.

The trust deed declares explicitly that, "should default be at any time made in the payment of any part, either of the accruing interest or of the principal sum secured to be paid by any bond or bonds issued under the authority aforesaid," the trustees shall take possession of the property mentioned in the deed of trust, and proceed to sell the same at public auction in the city of Atlanta, and shall apply the net proceeds of the sale in the payment of the interest due on the bonds, and to the extinguishment of the principal of such of the bonds as may then be due. It seems to me that this provision of the trust deed completely overturns the idea that there can be no proceeding for a sale of the trust property, or any part of it, until the maturity of the principal of the bonds.

One of the solicitors of defendant, while not agreeing with the construction of that deed just noticed, insists that until the bonds mature there can only be a sale of so much of the trust property as may be necessary to discharge the interest due and unpaid. But in the view I take of the case it is unnecessary to pass upon this dispute. It is clear to my mind, and it is conceded by one of the solicitors for defendants, that there may be a sale of trust property sufficient to satisfy the interest due and unpaid.

On the other hand, complainants insist that a default in the payment of interest makes both principal and interest due, and that the court should order a sale for the whole amount of both

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principal and interest. Without going into a critical examination of the language of the deed of trust, I content myself with saying that it seems very clear that when the interest is in arrear, the trustees may sell the entire trust property. The trust deed seems to contemplate but one sale, and on such sale, a full and complete settlement of the trust.

Conceding, then, that there must be a sale to pay the interest due and unpaid, the question arises, Should there be a sale of the entire trust property, or only a part of it?

I think this question is settled by the averment of the bill admitted by the answer of the defendant railroad company, and nowhere in the pleadings denied, that the railroad with its appurtenances is in the nature of an entirety, and constitutes one and a continuous line, and that its unity and continuity are the most important elements of its value, and that to separate any part from any other part would greatly impair the whole.

This averment of the bill is not only admitted by the answer of the defendant company, but there is not a scrap of evidence in the record to show that it is not entirely true.

And, as a general rule, it must be evident that to cut up a railroad and sell it piecemeal would destroy its value. While a sale of a particular part might be made, in some cases, without serious detriment to the part sold; yet from that fact, it would by no means follow that the residue would remain uninjured.

That where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property cannot be sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due, is sustained by the following authorities: *Salman v. Claggett*, 3 Bland's Ch., 125, and other cases there cited; *Seaton v. Twyford*, 11 Law Rep. Eq. Cas., 591; *Dunham v. Railway Company*, 1 Wall., 254; *Olcott v. Bynum*, 17 id., 44; *Pope v. Durant*, 26 Iowa, 233.

Upon the case as presented, I am therefore of opinion, if any part of the road is sold, the whole may and should be sold.

If a sale of the whole is made, it will be then time to consider what shall be done with the proceeds. That is a question which,

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it seems to me, does not, under the practice of courts of equity, present any grave difficulty.

It is objected to a sale of the whole property of the defendant railroad company that the property is owned by two distinct corporations, one of which, a resident of South Carolina, owns the property of the railroad in that state, and that there can be no merger of railroad corporations extending through several states which will so destroy their individuality as to confer on the united corporation all the franchises of the several parts; that a corporation cannot be chartered by two states so as to have a common individuality in both.

The inference drawn from this proposition is, that this court can only order a sale of the railroad property in Georgia which is owned by the Georgia corporation, which alone is a party defendant to the bill, and that the court cannot order a sale of the property in South Carolina, which is owned by a distinct corporation which is not before the court.

It would seem to be a sufficient reply to this proposition to say that the Atlanta & Richmond Air Line Company has answered, admitting the union and consolidation of the two companies into one company, has contracted as one and not as two companies, has issued bonds and secured them by a deed of trust as one company, covering its entire line of road and property, and has agreed that the whole might be sold by one sale, at Atlanta, in the state of Georgia. Even if this proposition of defendant's solicitor were true, we think the facts would estop the South Carolina company from setting up its separate existence and separate property, and we think that it has, by the answer of the Atlanta & Richmond Air Line Company, entered its appearance in this cause.

But is it true that a corporation cannot be chartered by two states so as to make one and the same corporate body?

When this case was up on motion for the appointment of a receiver, I passed upon this question, and held that two states might, by concurrent legislation, unite in creating the same corporate body. It is unnecessary to repeat what I then said. See *Railroad Co. v. Maryland*, 10 How., 376; *Railroad Co. v. Harris*, 12 Wall., 92.

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Counsel for defendants refer to the following cases as establishing the doctrine upon which they rely: *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286; *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How., 325; *Railway Co. v. Whitton*, 13 Wall., 270; *Tomlinson v. Branch*, 15 id., 460; *Railroad Co. v. Jackson*, 7 id., 262; *The Delaware Railroad Tax*, 18 id., 206.

I have examined these cases and cannot find in them anything to overturn the positive declaration of the court in *The Railroad Co. v. Harris*, *supra*. On the contrary, *The Delaware Railroad Tax case*, *supra*, strengthens the view of the court in that case.

I am of opinion, therefore, that the Atlanta & Richmond Air Line Railway Company is one and the same corporation, both in Georgia and South Carolina, and that this one corporation is properly before the court.

But concede that there are two corporations under the name of the Atlanta & Richmond Air Line Railway Company, one created by and residing in Georgia, and the other created by and residing in South Carolina. It is made perfectly clear by the pleadings and evidence that these two corporations, if there be two, have joined under their common name in executing the bonds and deed of trust in the bill mentioned, over the common property of the two corporations. Now the Georgia corporation has been served with process and is before the court, and the South Carolina corporation has entered its appearance, and both the corporations have united in a common answer to the bill. The court, therefore, has jurisdiction over both; for while the South Carolina corporation, if it exists as a distinct corporate body, has the right to demand that it shall be sued only in the district where it resides or is found, it may waive this right and enter its appearance as a defendant in any district it pleases. *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 15 How., 242. It has appeared in this court in this cause as a defendant, and it therefore may be bound by its decree.

It is further insisted by the defendants' counsel that as a large part of the property covered by the deed of trust is beyond the territorial jurisdiction of this court, we are without power to order the sale.

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The paper executed by the Atlanta & Richmond Air Line Railway Company is a deed of trust to trustees, conveying to them all the railway and other property of the company, with power to sell the whole at the city of Atlanta, in the state of Georgia, if default should be made in payment of interest or principal. Now it cannot be seriously contended that these trustees could not without the aid of this court, by following the direction of the deed of trust, have sold the entire line of the defendant company's road and have conveyed a good title to the whole, extending as it does from Atlanta to Charlotte. Is the power of the trustees any less, because this court has been asked to construe the deed of trust and to order them to execute the trust? If the trustees, under the direction of this court, sell the whole road, they do so by virtue of the power vested in them by the deed of trust. We are not asked to foreclose a mortgage. We are not asked to confer on the trustees any power which they do not already possess, by virtue of the deed of trust, or to impose upon them any new duties, but simply to tell them what their powers are under their deed, and require them to exercise their powers for the benefit of the *cestuis que trust*. The complainants may, by reason of obstacles existing in the other states through which the railroad runs, be compelled to file ancillary bills in those states; nevertheless, I think it is proper and that this court has jurisdiction to order in this case a sale of the entire line of road.

I think what has just been said is an answer to the argument, that under the code of Georgia, a mortgage can only be foreclosed when the entire principal or an installment of it is due. No foreclosure is asked here. The complainants seek only to exercise what they think to be their rights under the deed of trust, by a sale according to the terms of the trust deed. The conclusions I have reached are the following :

1. That the Atlanta & Richmond Air Line Railway Company, whether it is a single corporation or two corporations of that name, is properly before this court.

2. That it is the meaning of the deed of trust, that the road of the company, or so much as may be necessary, may be sold to pay interest coupons due and unpaid, without waiting for the maturity of the bonds.

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3. That the road is an entirety and cannot be sold piecemeal without injury to the value of the road, and therefore the entire road may and should be sold.

4. That the trustees, by virtue of their power under the deed of trust can, by the direction of this court, sell the entire road lying in three states, and convey a good title to the whole.

5. That the trustees ought to be required to make the sale in accordance with the directions of the deed of trust.

6. When the proceeds of the sale are brought into the court, the court will direct how the residue, remaining after the payment of the interest due, shall be disposed of.

In accordance with the foregoing opinion, a decree was made by which there was a finding of the amount of interest due and unpaid, and the trustees were ordered to sell at Atlanta, Georgia, in the manner, and after the notice prescribed by the trust deed, the entire line of the defendant company's road, extending from Atlanta to Charlotte, North Carolina.

The Atlanta & Richmond Air Line Railway Company prayed an appeal from this decree to the supreme court of the United States, which was allowed, and the penalty of the appeal bond was fixed at \$800,000. This sum was arrived at as follows: It was made to appear that the property conveyed by the deed of trust would not probably sell for more than the principal and interest owing upon the bonds at the date of the decree, and that the cause would remain pending in the supreme court at least two years before final hearing, and that the interest which would accrue upon the bonds during that time would amount to a little more than \$798,000. Under rule 32 of the United States supreme court (6 Wall., v), the penalty of the bond was therefore fixed at \$800,000, and it was ordered that upon the execution by the appellant of a bond in that sum, with sureties to be approved by the clerk, the appeal should supersede the execution of the decree.

In re Smith.

AT CHAMBERS, MARCH, 1876.

In re JOHN W. A. SMITH.

The act of congress, approved March 3, 1873, prescribing what property shall be allowed the bankrupt, as exempt from the operation of the bankrupt law, is uniform and constitutional.

This was a petition filed to reverse a decree of the district court in bankruptcy. The facts of the case appeared from the pleadings and evidence to be as follows: John W. A. Smith, was adjudicated a bankrupt by the district court on June 3, 1873. At the date of the adjudication, the petitioner, Mathew Whitfield's administrator, was the judgment creditor of the bankrupt in the sum of \$8,397. The judgment was rendered prior to July 21, 1868, when the present constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt.

By an act passed prior to and in force in 1864, when the debt due to the petitioner was contracted and which remained in force until the adoption of the constitution of 1868, there was allowed to the head of a family, as a homestead exempt from execution, fifty acres of land, and in addition thereto, five acres for each of his children under sixteen years of age.

By the constitution of 1868, and by an act of the legislature, passed October 3, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty, exempt from execution, of the value of two thousand dollars.

The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against the bankrupt estate, prior to June 30, 1874. On that day the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the act of 1864, namely, ninety acres of land, that being fifty acres and five acres in addition thereto for each child of the bankrupt under sixteen years of age.

The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the constitution of 1868, and the

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act of October 3, 1868, to wit: realty of the value of \$2,000. He therefore filed with the register his objections to the assignment made by the assignee.

The register referred the question thus raised, with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off under the provisions of the act of October 3, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted, and the judgment therefor a lien upon the realty of the bankrupt before the change in the homestead law.

To review and reverse this decision of the district judge is the purpose of this petition, filed by the administrator of the judgment creditor.

Messrs. C. Peeples and E. P. Howell, for petitioner.

Messrs. J. S. Boynton and F. S. Dismuke, contra.

Woods, Circuit Judge. The case turns upon the constitutionality of the act of congress approved March 3, 1873, entitled "an act to declare the true intent and meaning of the act approved June 8, 1872, amendatory of the general bankrupt law" (17 Stat., 577; Rev. Stat., sec. 5045). This statute enacts that "the exemptions allowed the bankrupt * * shall be the amount allowed by the constitution and laws of each state respectively as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

To put the question clearly in view, it must be stated that after the adoption of the constitution of 1868, and the act of October 3, 1868, to carry into effect the exemptions prescribed by the constitution, the supreme court of Georgia, at its January term, 1873, in the case of *Jones v. Brandon*, 48 Ga., 593, decided that the provisions of the constitution and of the law so far as they increased the exemptions of property from execution as

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against debts contracted before their adoption were in conflict with that clause of the constitution of the United States, which declares: "No state shall * * * pass any * * law impairing the obligation of contracts" (Const. of the U. S., art. I, sec. 10), and were therefore null and void.

The same decision had in effect been previously made by the supreme court of the United States in the case of *Gunn v. Barry*, 15 Wall., 610.

It follows from this state of the law as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on June 30, 1873, he was not authorized to set apart as against Whitfield's administrator, any greater quantity of realty than was authorized by the act of 1864, except as he derived his authority from the act of congress of March 3, 1873, above quoted. In other words, there was no valid and operative state law by which the bankrupt could claim that he was entitled to a homestead of the value of \$2,000, as prescribed by the constitution and law of 1868.

The question, therefore, whether the act of congress of March 3, 1873, is constitutional, is vital to the decision of this case.

The objection to this act is not that it impairs the obligation of contracts, for congress is not prohibited by the constitution from passing such a law. *Evans v. Eaton*, Pet. C. C., 328; *Satterlee v. Matthewson*, 2 Pet., 380; *Bloomer v. Stolley*, 5 McLean, 158. Besides, the power expressly given to congress "to establish uniform laws on the subject of bankruptcies throughout the United States" implies the power to impair the obligations of contracts. *Hepburn v. Griswold*, 8 Wall., 603; *The Legal Tender Cases*, 12 id., 457.

The ground of objection is, that the law is not uniform as required by the constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several states is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the state wherein he resided. Upon this ground, the original provision of the

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bankrupt act, which adopted the state exemption laws in force in 1864, was declared to be uniform. *In re Beckerford*, 1 Dill, 45.

But it is said that the act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the states in 1871, even though some of them may have been declared unconstitutional, invalid and inoperative by the state courts; that the operation of the act of congress is therefore not uniform, because in some states the exemption allowed by the state law is followed, while in others, exemptions are permitted, which the state laws, as interpreted by the courts, do not allow.

The same objection would apply to the original bankrupt act of 1867. That declared that the exemptions allowed by the state laws in force in 1864 should be allowed under the bankrupt act. The unconstitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the states might have altered, amended or repealed the exemption laws which were in force in 1864. Doubtless, many of them did so before the passage of the act of 1873. Yet the bankrupt act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform.

Had the bankrupt act made no exemption at all, or a horizontal one, as of such a number of dollars, or of certain specified articles, it would have been less uniform than the rule adopted in 1867 or 1873, because the contracts made in each state were subject to the implied condition that they could never be enforced against the property of the debtor exempted by the laws of such state, and a horizontal exemption would have cut down contracts in one state and aided them in another, which would not have been uniform; that is, it would not have been paying uniform respect to the obligation of contracts made in different states.

Perhaps the most exactly uniform rule would have been to subject every contract to such an exemption as it was liable to when made. But that would not have been practicable, for the

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property of the same debtor would, in many instances, have been liable to different exemptions, and his property would always be taken by the claims which were subject to the least exemption, but only for the benefit of the owners of such claims, so that some creditors would get a larger percentage of their claims than others.

It appears, therefore, that the best thing congress could do was to adopt the state exemptions existing at a recent day and likely to affect most contracts made by the bankrupt.

Congress has undertaken to say that all exemptions in force at a certain date by laws of the state shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that, to make the law uniform, it was not necessary to enact that the bankrupt act should follow the shifting legislation of the states on the subject of exemptions, or the decisions of the state courts.

Thus, the bankrupt act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the act of October 3, 1868.

Suppose the bankrupt act of 1867 had declared that all exemptions by the state law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a state had, at a subsequent time, amended its exemption laws, or the courts of another state had declared its exemption laws unconstitutional? I think it would not. In other words, I think congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature or declared null by the courts.

I am advised that a different view of the subject has been taken by the United States circuit court for the eastern district of Virginia, *In re Deckert*, 1 Am. Law Times (N. S.), 326. But, in passing upon the constitutionality of an act of congress, all the presumptions are in favor of the law. While, therefore,

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disposed to yield great weight to this high authority, I cannot forget that, in the opinion of the congress of the United States, this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. *Fletcher v. Peck*, 6 Cranch, 87; *Dartmouth College v. Woodward*, 4 Wheat., 625; *Livingston v. Moore*, 7 Pet., 469.

While I admit that the argument against the constitutionality of this act is plausible and persuasive, yet I cannot say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided and inevitable.

Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of district court.

JARED I. WHITAKER for the use of E. D. DODGE vs. JOHN D. POPE.

1. Interest from the commencement of the suit is recoverable as a matter of law in an action upon a money demand, even though interest is not claimed in the petition.
2. A claim for money taken as usury, while a law forbidding usury was in force, is not destroyed by the repeal of the law.
3. *Indebitatus assumpsit* would be a proper form of action at common law, to recover money paid as usury. Under the code of Georgia, the action for open account would seem to be applicable.
4. A bill of particulars appended to a petition to recover money paid as usury, which sets forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant, is sufficient.
5. Where an action was brought in the name of A. for the use of B., and it appeared on the trial that before suit brought, A. had assigned the claim to B., who therefore held the legal title, an amendment under the code of Georgia was allowed after verdict by striking out the name of A. from the petition.
6. When a debtor had notice that his creditor A. had assigned the debt due him to B. and, afterwards procured a counterclaim against the original creditor A., held, that he could not use such claim as a setoff in a suit brought in the name of A. for the use of B., to recover the debt assigned to B.

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ACTION AT LAW.

Heard upon motion in arrest of judgment and motion for new trial.

Mr. A. T. Akerman, for the motions.

Mr. L. E. Bleckley, contra.

BRADLEY, Circuit Justice. The defendant moves in arrest of judgment because the verdict is for interest as well as principal, when no interest is demanded in the petition. But the interest given by the verdict is only interest from the commencement of the action. This need not be demanded, but follows as a matter of law.

The defendant then moves for new trial on several grounds:

1. That in 1873 the legislature repealed all laws on the subject of usury, and, therefore, usury taken prior to that time can not be recovered back. This is not so. When the usury was taken, it was taken against law, and the usury paid therefor was money had and received by the defendant for the use of the plaintiff. This demand was not canceled by the repealing law. After the law was passed, there was no such thing as usury, but prior to it there was, and the law did not and could not annihilate that state of things, or the rights that grew out of it.

2. That the action for an open account is not applicable to the recovery of money paid by way of usury. An examination of the code, however, induces the conclusion that it is a proper form of action. *Indebitatus assumpsit* for money had and received would have been a proper form of action under the common law system of pleading, and where that action would formerly lie, the action for open account would seem to be generally applicable under the code. Besides, the objection could be covered by proper amendment if it were material.

3. That the bill of particulars was insufficient. This objection is not well taken. The bill sets forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant. This is the meaning of the form of account given, and this expresses the legal effect of money paid on account of usury. It is cash paid for which the receiver is indebted to the payer.

4. That the action was brought in the name of Whitaker for

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the use of Dodge, when it ought to have been brought in the name of Dodge himself, to whom, as it appeared by the evidence, Whitaker had assigned the claim as collateral security for a debt. We think that the assignment produced did have the effect of passing the legal title of the account to Dodge. The operative words of the agreement are "turn over," instead of "assign," which, in our view, means the same thing. To turn over a note or an account as collateral security means the same in law as to assign it for that purpose. But the petition discloses the fact of Dodge's interest. It states that Whitaker sues for the use of Dodge. The defendant could not have been misled by this form of action, and he was not injured by it. He was allowed to make every defense which he could have made if the action had been in the name of Dodge. We think, therefore, that the petition may be amended by striking out the name of Whitaker, and making Dodge plaintiff in form as he is in substance. Parties may always amend if there is enough in the pleadings to amend by. Code, sec. 3479. In this case we think there is enough to amend by. The code goes on to specify some particular cases: thus, coplaintiffs or defendants who are omitted may be added; coparties improperly inserted may be stricken out; a person's name may be added as suing for the use of the original party; and representative character may be added or stricken out. Code, secs. 3483, 3487.

We think that the present case is within the reason of the law relating to such amendments.

5. That the defendant was not allowed a setoff claimed by him. We think that this setoff was justly disallowed. It was a claim against Whitaker, procured by the defendant after he had been served with the petition—which showed the fact that Whitaker was suing for the use of Dodge. The defendant, therefore, had notice, before procuring this claim, that Dodge had an interest in the claim sued on. He procured the counterclaim before the petition was filed, it is true; but that does not matter. He had notice of Dodge's interest; and it was too late for him to buy up claims against Whitaker.

We see no reason for granting a new trial for any of the causes above specified.

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The other grounds relied on are exceptions to the charge and rulings of the court. It is sufficient to say, that after giving them due examination, we do not see any sufficient cause for setting aside the verdict. The rulings were substantially correct, and the defendant has suffered no legal injury thereby.

Motion denied.

SOUTHERN DISTRICT OF ALABAMA.

APRIL TERM, 1874.

NANNIE C. MITCHELL VS. LIPPINCOTT & Co.

1. Under the "married woman's law" of Alabama, as now construed, a married woman can in no case mortgage her separate estate, however acquired or held, for her husband's debts.
2. A married woman executed a mortgage on her separate estate to secure her husband's debt at a time when, according to the decisions of the supreme court of the state, such a mortgage was valid. By subsequent decisions of the same court, such a mortgage was declared invalid: *Held*, in a proceeding to enforce the mortgage, that the federal court was bound by the later adjudications of the state supreme court.

IN EQUITY.

This cause was heard for final decree upon the pleadings and an agreed statement of facts.

Messrs. A. R. Manning and Percy Walker, for complainant.

Messrs. T. N. McCartney and M. E. McCartney, for defendants.

Woods, Circuit Judge. On the 19th of March, 1866, there was conveyed to the complainant, who was a *feme covert*, by a deed of that date, certain real estate in the city of Mobile. The deed in the granting clause purported to convey the premises to the said Nannie C. Mitchell, her heirs and assigns forever. The *habendum et tenendum* clause was as follows: "To have and to hold the above granted and bargained premises unto the said Nannie C. Mitchell, her heirs and assigns, to the sole and proper use, benefit and behoof of the said Nannie C. Mitchell, her heirs and assigns forever."

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On the 17th of February, 1869, the complainant jointly with her husband, executed a mortgage on this property to the defendants. The mortgage was not to secure any debt of the complainant, but was to secure one for which her husband expected to become liable.

The mortgage contained a power of sale, and the debt secured thereby not having been paid in full, the defendants advertised the premises for sale.

This bill was filed for a perpetual injunction to restrain the defendants from selling the property under the mortgage.

The claim of the bill is that the premises were the separate property of the complainant as a married woman, and that under the laws and jurisprudence of this state, she could not incumber her separate estate for her husband's debts, and that her mortgage for that purpose is absolutely void.

The "married woman's law," as it is called, was passed in 1850, and is found in the revised code, sec. 2371, *et seq.* Section 2371 declares that "all property of the wife held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband."

The complainant claims that under this provision of the law, as now construed by the supreme court of the state, the mortgage upon her property was absolutely void for want of power in her to incumber it for the debt of her husband.

The defendants claim that under the decision of the supreme court of the state, construing the "married woman's law," the estate a *feme covert* might acquire, as at common law, was not interfered with by this act. So that after the passage of this act, a married woman in this state might hold two kinds of separate estate, each governed by different laws. One was called her separate estate under contract or deed, and the other her separate estate under statute, or statutory separate estate; that the distinction was, that if she held by a deed which used words of such significance as to exclude the marital rights of the husband, the deed itself gave her a separate estate, and the rules of the common law governing such an estate applied; but if the conveyance under which she held used no such words, or the estate came to

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her by descent, then she held it as separate estate under the code, and the rules of law governing such an estate were laid down by the code; that when the estate was a separate estate by deed or contract the wife might, as at common law, incumber it for her husband's debts, by mortgage properly executed.

The defendants claim that this construction of the law was maintained by the supreme court of the state until after the execution of the mortgage to them by complainant; that under the law as so construed, her estate was a separate estate by deed, and she might well incumber it for her husband's debts. They cite *Cowles v. Morgan*, 34 Ala., 535; *Paulk v. Wolfe*, 34 id., 541; *Gunter v. Williams*, 40 id., 561; *Nun's Adm'r v. Givhan*, 45 id., 375.

It is however conceded by the defendants, that since the date of this mortgage the supreme court of the state has adopted a different construction of sec. 2371 of the revised code, and that they now hold that there is no distinction between the two sorts of separate estates; that both are governed by the code, and that in no case can a married woman mortgage her separate estate, however acquired or held, for her husband's debts.

But the defendants insist that this court is not bound to follow these later adjudications, but should adhere to the law as construed by the court at the time the contract was made. In my judgment, this claim of the defendants is not well founded.

The mortgage to the defendants, as above stated, bears date the 19th of February, 1869. In January, 1869, the supreme court of the state decided the case of *Bibb v. Pope*, reported in 43, Ala., 190. In that case it appeared that on August 10, 1860, there was conveyed to Mrs. Evelyn Pope, who was then intermarried with Augustus Pope, the premises in controversy "to have and to hold the same to her, her heirs and assigns, to her use and behoof forever." On the 6th of April, 1866, Pope, the husband, borrowed \$10,000 of the plaintiff Bibb, for which he gave his bill of exchange, and he and his wife executed to Bibb a mortgage, with power of sale on the premises, to secure the payment of the same.

Pope failed to pay the bill at maturity and Bibb advertised the property for sale. Thereupon Mrs. Pope, by her next friend,

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filed her bill for a perpetual injunction to restrain the sale, claiming that the mortgage was void.

I have been thus particular in the statement of this case that it may appear how nearly it resembles in its facts the case at bar.

In deciding the case, the court said: "The only question discussed at the bar was whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it to pay her husband's debts. This question has not heretofore been settled by any decision of this court."

The court then decides that if the sale of the separate estate of the wife to pay the husband's debts was permitted, the whole purpose of the law, so far as it protects the wife's separate estate, would be defeated, and that the wife had no power to mortgage her separate estate for her husband's debts.

Conceding that the decision of the supreme court of the state had been as claimed by defendants up to the case of *Bibb v. Pope*, it is clear that the rule was broken over by this case and a different one adopted. And this decision was made before the date of the mortgage.

The ruling in this case has since been adhered to by the court. *Cowles v. Marks*, 47 Ala., 620; *Ellett v. Wade*, 47 id., 464; *Denechaud v. Berry*, 48 id., 591.

But suppose, as claimed by the defendants, the rulings had been, as stated by them, until after the delivery of the mortgage and the construction of the law had then been changed, which construction ought this court to follow?

The defendants say that we are bound to enforce the law according to the construction given it at the date of the mortgage.

In support of this position, they cite the case of *Gelpcke v. Dubuque*, 1 Wall., 206, in which the supreme court of the United States says: "The sound and true rule is, that if the contract when made was valid, by the laws of the state, as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature or decision of its courts altering the construction of the law." Also *Havemeyer v.*

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Iowa City, 3 Wall., 303; *Olcott v Supervisors*, 16 id., 678; *Ohio Life Insurance Co. v. Debolt*, 16 How., 432.

It is to be observed that the case of 16th Howard was the case of a contract made by the state, and the court held that the rules of interpretation which required the federal to follow the state courts in the construction of the laws of the state "were confined to ordinary acts of legislation, and did not extend to the contracts of the state, although they should be made in the form of law."

The cases in 3 and 16 Wallace concerned the interpretation of laws upon which the validity of bonds issued by municipal and political corporations depended.

On the other hand, in the case of *Snyder v. Williamson*, 24 How., 427, the supreme court of the United States held that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by the supreme court that would be applied by the state tribunals.

In this case the supreme court, following a change in the decisions of the supreme court of New York, reversed its own decision in *Williamson v. Berry & Howard*, "although property had been bought and sold upon the faith of the opinion there delivered and the judgment pronounced by this court."

So in the earlier case of *Jackson v. Chew*, 12 Wheat., 162, the court said: "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court as by the state tribunals."

So also in *Beauregard v. New Orleans*, 18 How., 497, the court says: "The constitution of this court requires it to follow the laws of the several states whenever they properly apply, and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relation of courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and to fulfill that duty, they must

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find them as they exist in the habits of the people and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischiefs and confusion."

In *Leagus v. Egery*, 24 How., 264, the supreme court of the United States reversed its own decision, made in *Arguello v. United States*, 18 How., 539, to the effect that the colonization regulations of Mexico of 1824 and 1828 did not prohibit the settlement of the littoral or coast leagues by natives under the authority of the governor of California and without the consent of the central government of Mexico. This was done without re-examining that opinion or making any attempt to account for or reconcile the differences, because the supreme court had found that a contrary opinion had prevailed in the courts of Texas, and had become a rule of property there.

That the decisions of the state courts touching the title to lands are to be treated as binding authorities in the courts of the United States is held in the following cases: *Polk v. Wendal*, 9 Cranch, 87; *Rundle v. Delaware Canal Co.*, 14 How., 93; *Thatcher v. Powell*, 6 Wheat., 119; *Elmendorf v. Taylor*, 10 id., 152; *Ross v. Barland*, 1 Pet., 655; *McKeen v. Delancy*, 5 Cranch, 22.

The settled construction of a state statute is considered as a part of the statute. *Massingill v. Downs*, 7 How., 767; *Nesmith v. Sheldon*, 7 id., 812; *Van Rensselaer v. Kearney*, 11 id., 297; *Webster v. Cooper*, 14 id., 504; *Green v. James*, 2 Curt. C. C., 189; *Woolsey v. Dodge*, 6 McL., 142; *Thompson v. Phillips*, Bald., 246.

In construing the statutes of a state, infinite mischief would ensue should the federal courts observe a different rule from that which has been long established in a state. *McKean v. Delancy supra*.

In cases depending upon the statutes of a state, and more especially those respecting the titles to land, the federal courts observe the construction of the state, when that construction is settled or can be ascertained. *Polk v. Wendal, supra*.

The supreme court uniformly acts under a desire to conform

its decisions to the state courts upon local laws forming rules of property. *Mutual Assurance Society v. Watts*, 1 Wheat., 279.

The supreme court holds in the highest respect decisions of state courts upon local laws forming rules of property. *Shipp v. Miller*, 2 Wheat., 316.

When the construction of the statute of the state relates to real property, and has been settled by any judicial decision of the state where the land lies, the supreme court, upon the principles uniformly adopted by it, will recognize the decision as a part of the local law. *Gardner v. Collins*, 2 Pet., 58.

In construing local statutes respecting real property, the courts of the Union are governed by the decisions of state tribunals. *Thatcher v. Powell*, 6 Wheat., 119. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell v. Warren*, 2 Black, 603, and cases there cited.

If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, the federal courts will follow the latest settled adjudication. *United States v. Morrison*, 4 Pet., 124; *Green v. Neil's Lessee*, 6 Pet., 291; *Leffingwell v. Warren*, *supra*.

The question whether a mortgage of real estate is valid or not is certainly a question touching real property. The case at bar, therefore, falls within the decisions cited. The rule, established by the earlier decisions of the supreme court, is recognized in the case of *Olcott v. The Supervisors*, 16 Wall., 678, cited by the defendants, in which Mr. Justice Strong, delivering the opinion of the court, says: "It is undoubtedly true, in general, that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state which the federal courts adopt as rules for their judgments."

Do not the adjudications of the supreme court of Alabama, construing the statute of the state regulating the rights of mar-

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ried women and the validity of mortgages executed by them upon their real estate, fall within the class of cases mentioned by Judge Strong, where the federal courts are bound to follow the state decisions? If the rule is ever to be applied to any case, it seems to me the construction of the "married woman's law" is a proper case for its application.

The conclusion must therefore be that the mortgage of the complainant was void and the defendants ought to be restrained from proceeding under it to subject the mortgage premises to sale.

Decree accordingly.

HENRY CLEWS & Co. vs. THE COUNTY OF LEE.

1. Upon an application for the peremptory writ of *mandamus* to compel a court of county commissioners to assess and collect a tax to pay off a judgment recovered in a federal court against them, no matter can be set up against the application which was properly used as a defense against the recovery of the judgment.
2. Nor will it be a reason why the writ should not be granted, that the court of county commissioners has been enjoined from the assessment and collection of the tax by a state court. The effect of the case of *The Supervisors of Carroll County v. The United States*, 18 Wall., 71, considered.

On May 10, 1872, Henry Clews & Co. recovered in the federal court for the middle district of Alabama a judgment against the county of Lee, in the state of Alabama, for the sum of \$13,722, being the amount due upon certain unpaid coupons which had been attached to certain bonds of said county, issued by it in payment of a subscription to the capital stock of the Eufala, etc., Railroad Company. Execution was issued on this judgment and returned *nulla bona*. This application was made to the court for a peremptory writ of *mandamus* to compel the court of county commissioners of Lee county to levy and assess, as required by law, a tax not exceeding one per centum per annum upon the real and personal property of the county sufficient to pay the judgment.

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At a former term of the court an alternative writ had been granted, issued and served upon the persons composing the court of county commissioners for Lee county. They filed their answer to the same in which they alleged as reasons why the peremptory writ should not issue: (1) That the bonds on which the judgment was recovered were void in the hands of the first holder, namely, the railroad company to which they were issued in payment of stock, because the terms of the law which authorized their issue had not been complied with, and (2) That Clews & Co. were not *bona fide* holders for value.

Mr. Samuel F. Rice, for the motion.

Mr. Geo. W. Stone, *contra*.

Woods, Circuit Judge. In the action at law, brought by Henry Clews & Co. against the county of Lee, in which the judgment was recovered, the defendant pleaded the general issue, and two special pleas in which the invalidity of the bonds was alleged, and in which it was asserted that the plaintiffs were not *bona fide* holders for value of said bonds.

These matters must necessarily have been passed upon by the court, adversely to the assertions of defendant, before judgment could have been recovered for plaintiffs.

Having had its day in court upon these issues, can they be again raised upon this motion? The respondents are concluded by the judgment at law. They cannot go behind it to raise any question touching the causes of action upon which it was rendered. *The Mayor v. Lord*, 9 Wall., 413.

It is further alleged as a reason why the writ should not issue, that the court of commissioners of Lee county has been restrained by an injunction issued by the chancery court of Lee county from the collection of any tax to pay the interest upon the bonds; that the bill, upon which the injunction was granted, was filed on the 26th day of November, 1870, and the injunction was made perpetual.

So far as the pendency of this bill is supposed to be notice of the invalidity of the bonds to all persons, and to establish that Henry Clews & Co. are not *bona fide* holders, they having, as claimed, come into possession of the bonds after the filing of the

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bill, what has already been said has disposed of this point. That defense has already been passed upon and adjudicated by the judgment at law.

Is the fact that the court of county commissioners has been enjoined by the state court of chancery from collecting the tax, which it is the purpose of the *mandamus* prayed for to compel them to levy and collect, a reason why the writ should not issue? The decisions of the supreme court of the United States are adverse.

In *Riggs v. Johnson County*, 6 Wall., 195, which was a case, in most of its features similiar to this, it was held that "state courts are exempt from all interference by the federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action, the process issued by one is as far beyond the reach of the other as if the line of division between them was traced by landmarks and monuments visible to the eye.

"Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of state tribunals."

To the same effect is the case of *The United States v. The Common Council of Keokuk*, 6 Wall., 516, where the supreme court says:

"Principal question in the case is, whether the injunction of a state court had the effect to take away the jurisdiction from the circuit court to issue the writ of *mandamus*. Discussion of that question is unnecessary, as this court decided at the present term, in the case of *Riggs v. Johnson County*, that a state court cannot enjoin the process of the federal court."

So in *The Mayor v. Lord*, 9 Wall., 409, where an answer was filed to the petition for the writ of *mandamus*, alleging, among other things, that the respondents had been enjoined by the state court from levying the tax, the supreme court says:

"The injunction cannot avail the respondents. The relator

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was not a party to the proceeding. If he had been, it is not competent for a state tribunal thus to paralyze the process issued from a court of the United States to give effect to its judgment. This is a sound and salutary principle. It is vital to the beneficial existence of the national courts, and has heretofore been applied by this tribunal, upon the fullest consideration, in other cases presenting the same question."

These decisions conclusively settle the question that the injunction issued by a state court restraining the collection of a tax to pay these bonds can have no effect upon the duty or power of this court, in a proper case, to direct the issuance of a *mandamus*.

The case of *The Supervisors of Carroll County v. The United States*, 18 Wall., 71, recently decided by the supreme court of the United States, has been pressed upon my attention as showing a disposition on the part of the court to recede from the position taken in the cases above cited.

I do not so read the case. The relator in that case had recovered a judgment against the county of Carroll upon county warrants issued for the ordinary expenses of the county. At the time of their issue, it was the settled law of the state, as prescribed by statute, and settled by the supreme court of the state, that the board of supervisors could not levy a tax for the ordinary expenses of the county to exceed four mills upon the dollar. The warrants were issued with this implied understanding, that no greater tax was to be levied for their payment than that prescribed by law. The board of supervisors, in answer to the alternative writ, stated that they had levied a tax of four mills to pay the ordinary expenses of the county; and that the law did not authorize them to levy any greater tax.

This was held to be a sufficient return. The court says, "It is very plain that a *mandamus* will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. The office of a writ of *mandamus* is not to create duties,

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but to compel the discharge of those already existing. A relator must have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it, then, the duty of the supervisors to levy, in addition to a county tax of four mills, a special tax to satisfy a judgment against the county for its ordinary indebtedness? This question can be answered only by a reference to the statutes of the state."

After a critical examination of the state laws, the court reaches the conclusion that no law authorized the levy of a tax exceeding four mills for ordinary county expenses at the time these warrants were issued. "The holders of the warrants were therefore informed," says the court, "that by the laws of the state no special tax could be levied for their payment. It follows, therefore, that the return was sufficient."

This case is very different from the one now under consideration. Remembering that all questions touching the validity of the bonds in this case, and the ownership thereof by Clews & Co. are closed by the judgment in their favor, let us see what is the duty imposed upon the court of county commissioners by law. The 7th section of the act, approved December 31, 1868, under which the bonds were issued, acts of 1858, p. 516, declares that "the court of county commissioners of such counties in which the electors shall have voted in favor of subscription are hereby authorized and required to levy and assess, in the same manner as is now required by law for the collection of state and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds," etc.

As already intimated, the judgment in this case has settled all questions touching the validity of the bonds, including the question whether the electors had "voted in favor of said subscription." There is nothing, then, left for the court of county commissioners to do, but to levy the tax as authorized and required by the statute. This is their duty. To have this duty performed is a right of the petitioners. The section of the law authorizing and requiring this tax was a part of the contract under which they took those bonds, as much so as if it had been written upon their face. *Gunn v. Barry*, 15 Wall., 610.

Here, then, we find the right of the relators to compel the

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levy of the tax, and the duty of the respondents, coupled with the power to levy the tax.

Under these circumstances the duty of the court is plain, namely, upon the application of the petitioners, to compel the respondents to perform that duty which it is the right of the petitioners to have performed.

Let the peremptory writ of *mandamus* issue as prayed for.

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CHARITY P. KNOTT VS. THE SOUTHERN LIFE INSURANCE COMPANY.

1. A corporate body may exercise its functions in a foreign territory upon such conditions as may be prescribed by the law of the place.
2. A foreign corporation may be "found" in the sense in which that word is used in the judiciary act in a state other than that by whose law it was created.
3. A statute of Alabama declared that no foreign insurance company should do business in that state, unless it filed an agreement that service of process upon its agent in the state should be taken and held as service upon the company: Held that process from the United States courts for the districts of Alabama fell within the terms of the statute and agreement.

This cause was heard upon the motion of defendant to dismiss the case for want of jurisdiction.

The complaint averred that the plaintiff was a citizen of the state of Alabama, and that the defendant was a body corporate, organized under the laws of the state of Tennessee and a citizen of that state, but having an office and carrying on business by its agent, William T. Walthall, in the city of Mobile, in the southern district of Alabama, and that defendant had consented by its instrument under seal, executed and filed according to the statute of the state of Alabama, that service of process against it upon Walthall, its agent, should be taken and held as service thereof on said company.

The code of Alabama, Walker's Rev. Code, secs. 1180, 1190, provides that no agent of any fire, marine, river or life insurance

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company shall transact any business of insurance within the state of Alabama without first filing in the office of the comptroller "a written instrument under the seal of the company, authorizing such agent to acknowledge service of process for and on behalf of such company, consenting that service of process upon such agent shall be taken and held as if service upon the company, according to the laws of this state, or any other state, waiving all claims of error by reason of such service."

The summons in this case was personally served by the marshal upon Walthall, the agent of the defendant company in Mobile.

The ground upon which the defendant based its motion to dismiss the cause was, that it was neither an inhabitant of the district where the suit was brought, nor had it been found therein.

Messrs. Thomas H. Herndon, John Little Smith and T. A. Hamilton, for the motion.

Messrs. A. R. Manning, Percy Walker, Henry St. Paul and G. Y. Overall, *contra*.

Woods, Circuit Judge. The 11th section of the judiciary act 1 Stat., 78 and 79, Rev. Stats., sec. 629, provides that the circuit courts shall have original cognizance of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state. The same section also declares that no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

The first requirement of the law just cited is filled. The suit is between a citizen of the state where the suit is brought, and a citizen of another state. The plaintiff is averred to be a citizen of the state of Alabama, and the defendant a citizen of the state of Tennessee. The defendant corporation having been created by the state of Tennessee for the purposes of the jurisdiction of the United States courts, it must be regarded as a citizen of the

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state where it was incorporated, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive. *Louisville C. & C. Railroad Co. v. Letson*, 2 How., 497; *Marshall v. B. & O. Railroad Co.*, 16 How., 829; *O. & M. Railroad Co. v. Wheeler*, 1 Black, 297.

The plaintiff then being a citizen of the state where the suit is brought, and the defendant a citizen of another state, it is only necessary to give this court jurisdiction of the cause, that the defendant should be an inhabitant of, or found within the district for which the court sits.

The plaintiff claims that the averments of the complaint and the return of the marshal show that the defendant has been "found" within the southern district of Alabama.

It is well settled that the resident of another district, by an appearance generally, waives his privilege not to be sued out of the district where he resides or is found. *Irvine v. Lowry*, 14 Pet., 293; *Levy v. Fitzpatrick*, 15 id., 167; *Flanders v. Insurance Co.*, 3 Mason, 158; *Kitchen v. Strawbridge*, 4 Wash. C. C., 84.

But defendant insists that a corporate body can only be a citizen of the state by which it was created; that it cannot migrate; that it cannot become an inhabitant of another state, nor can it be "found" therein. To support this view, reliance is placed on the cases of *Bank of Augusta v. Earle*, 13 Pet., 519; *O. & M. Railroad Co. v. Wheeler*, 1 Black, 286.

The doctrine of these cases has been modified by later decisions. While it is settled law, as already seen, that a corporation created by one state cannot migrate and become a citizen of another state, yet it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented, and will be bound accordingly. *Railroad Company v. Harris*, 12 Wall., 81.

In the case just cited, the defendant company was held to be a Maryland corporation. It was sued in the circuit court of the District of Columbia. The law regulating the jurisdiction of that

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court (sec. 6, act of February 7, 1801, 2 Stat. 106) is identical with the second clause of the 11th section of the judiciary act of 1789, above quoted. It declares "that no action shall be brought before said court, by any original process, against any person who shall not be an inhabitant of, or found within said district at the time of serving the writ."

An act of congress, approved February 22, 1867, 14 Stat. 404, provided that foreign corporations doing business in the district of Columbia might be served with process by service on their agents, and such service should be effectual to bring the corporation before the court.

In the case of *The Railroad Company v. Harris*, service was made within the district of Columbia, upon the agent of the Maryland corporation, and the court held, in effect, that the service was a good one, and brought the defendant into court.

This case then settled the question that a corporate body may, in the language of the judiciary act, be "found" in a state other than that by whose law it was created.

If then the defendant company has agreed that service upon its agent in Mobile of process issued from the United States courts shall be taken and held as service upon the company, I think the defendant, by service upon Walthall, has been "found" within this district.

The defendant insists, however, that its agreement touching service of process, only applies to process issued from the state courts. It seems to me to be a sufficient answer to this, that no such intimation is to be found in the statute. It is general in its terms, and applies to the process of all the courts held within the state.

The statute was intended for the protection of the citizens of the state in their dealings with foreign insurance companies. It provides that they should place on record their appearance in advance, in any suit that may be brought, whether in a state court or federal court.

The state, by sec. 1180 of the code, has not attempted to vest this court with any new jurisdiction it did not possess under the constitution and laws of the United States. If the defendant, on suit brought, had voluntarily appeared in this court, and ac-

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knowledge of service of process, or waived it, there can be no question that this court would have jurisdiction. All the state law has done has been to require that the defendant should agree, as a condition precedent to the transaction of business within the state, that upon suit brought, it should either authorize its agent to acknowledge service of process, or allow service to be made on him. There is no restriction of this agreement to process issued by the state court, and in my judgment it applies to the process of the United States courts as well.

If these views be correct, it follows that the defendant is properly in court; that the court has acquired jurisdiction of its person, and having, as is conceded, jurisdiction of the subject matter, it is authorized to proceed with the cause to final judgment.

The motion to dismiss must be overruled.

CATHARINE MOORE vs. DANIEL MITCHELL.

1. A trustee who keeps no separate account of the trust fund, but mixes it with his own money, renders himself liable to account for it in case of loss.
2. A trustee having received the trust funds in good money, and loaned them out, afterwards received in repayment of the loan at par confederate treasury notes which were worth only thirty cents on the dollar, and which afterwards became worthless in his hands. *Held*, that he was not entitled to a credit for the amount unless he could show that he received the depreciated paper upon actual compulsion.
3. The trustee could not, under these circumstances, save himself from liability to account for the trust fund by offering to show that there was a parol understanding between the testator, from whose estate the trust fund came, and himself, whereby he agreed to manage the business of the trust with the same care as his own, and to make no charge for his services as trustee.
4. Where there is a prayer for general relief, a court of equity may afford such relief as the averments of the bill and the proofs warrant, although the complainant may not be entitled to the relief specifically prayed for.

IN EQUITY.

Heard for final decree on the pleadings and evidence.

The facts were as follows: By the last will and testament of

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James Mitchell, deceased, late of Sumpter county, Alabama, which was executed on September 29, 1855, the defendant, Daniel Mitchell, was made trustee for the complainant, Catharine Moore. There were devised to him in trust for said Catharine two slaves which he was authorized to hire or sell, and he was directed to pay to her during the lifetime of her husband either the hire or the interest of the money obtained from a sale of the slaves. The defendant was also entrusted by the will with the distributive share of the complainant in the testator's estate, and directed to pay her the interest thereon during the lifetime of the husband. On the death of her husband, the defendant was directed to pay to complainant the *corpus* of the trust fund committed to his hands by the provisions of the will.

In February, 1856, the defendant, as authorized by the will, sold the slaves and obtained therefor \$1,375. On August 31, 1857, the defendant received the distributive share of complainant in the estate of James Mitchell, amounting to \$1,150.

The defendant loaned out the trust fund on interest. He testified in regard to its management as follows: "I kept no separate account of the trust funds after they came into my hands; I accounted for the annual interest to the agent of complainant, and was ready to pay over the principal in the event of the death of complainant's husband, which was the time fixed by the will for me to pay her the *corpus* of the estate. I thought that was all I was required to do, and therefore kept no separate and distinct account of the trust fund, and cannot give the dates of the loans and other particulars inquired about. All the trust funds were put together and treated in the same way, and when necessary, I put some of my own funds with the trust funds to make out the sum a borrower might want. I kept no separate account of the trust fund and cannot furnish any."

The last loan of the trust funds was made by defendant to one Simmons Harrison. To the trust funds the defendant added about \$1,500 of his own money, making the loan about \$4,000. In March, 1863, the representatives of the estate of Harrison, the borrower, tendered defendant in payment of the debt confederate treasury notes, which were at that time worth at the rate of three and a half dollars for one of gold.

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The defendant accepted the notes in payment. He did not invest them in property of any kind, nor loan them again, but as he says, retained them till the close of the war. He has never rendered, or offered to render, any account of his trust, nor does he produce or has he ever exhibited to complainant the confederate treasury notes which he says he received from Harrison's estate in payment.

The purpose and prayer of the complainant's bill was that the trust created by the will of the late James Mitchell in her favor might be established, and an account taken of what was due complainant by reason thereof; that the trustee might be removed and decreed to pay to complainant whatever might be found due to her on account of said trust, and that she might have such other and further relief as it may appear to the court she was entitled to.

The defendant claimed by way of defense that by a verbal understanding with his father, the testator, had just before his death, he undertook to manage the trust as he managed his own business, and without any compensation; that he did so manage the trust estate; that he was compelled to receive confederate money for the trust funds loaned to one Simmons Harrison; that at the same time, he received the same kind of currency for a debt due to himself from the estate of Harrison; that having received such funds, he found it impossible to invest them or loan them, and they became worthless on his hands as a consequence of the late war.

The proof to sustain the defense, that the confederate treasury notes were received in payment of the debt due the trust estate by compulsion, consisted of the depositions of the defendant himself and of James M. Winston and Jonathan Bliss.

On this point the defendant testified: "If I had refused to receive the confederate money for a debt of any kind, I would have incurred the strong condemnation of my neighbors and friends, and would have been looked upon as a disloyal and suspicious character, and might have been subject to serious annoyance and injury in my person and property. To have refused to receive this money from the representative of a confederate soldier, killed in battle, would have subjected me to the additional

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odium of trying to make money out of the widow and orphans of a dead soldier, and of using my money to oppress them. The bare suspicion of such an attempt on my part would have brought down on me the contempt of every one, and could not have been done without risk of personal injury."

James M. Winston testified that in 1863, confederate currency was the only money in circulation in Alabama; "but I do not know," he says, "that the money was imposed on the people by irresistible force by the late confederate government. Said currency was made current as dollars in the county of Sumpter, where defendant resided, by the irresistible force of public opinion. If a creditor had refused confederate money when tendered, he would have been subject to great reproach and denunciation; but I cannot say how far it might have been carried. It would have been regarded as a stab at the confederacy, and as disloyalty to it and to the independence of the Confederate States."

Jonathan Bliss testified: "I cannot say that confederate currency was ever imposed upon the people of Alabama by irresistible force of the confederate government directly applied. The force compelling the circulation of confederate money was a compound one, made up in part of the action and influence of the confederate government, its officers and friends, in part by the action and influence of the state government and officers, in part by the necessities of life, and largely by the public voice and demand; and by the further fact that there were in some places combinations of men acting as committees of vigilance, claiming to supervise and deal with obnoxious individuals considered disloyal to the confederate cause. In 1863, a refusal of confederate money would have subjected the party to much reproach and indignity, and unless he was fortified by strong personal position, to degrees of violence and outrage."

On cross examination, this witness testified in answer to the question whether he knew any persons who refused to take trust money in confederate notes and were not mobbed or murdered: "I refused to take it in such cases as long as I could, but finally felt constrained to yield as to interest, and in some cases when I thought there was danger of the debtor becoming insolvent, as to the principal."

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Messrs. R. H. Smith and R. I. Smith, for complainant.

Messrs. William Boyles and G. Y. Overall, for defendant.

WOODS, Circuit Judge. The complainant bases her claim for relief substantially on two grounds:

1. That the defendant did not keep the trust estate separate from his own, but mingled it with his own money, and thereby made himself the debtor of complainant and liable to pay absolutely the trust money with interest.

2. That the defendant was not justified in receiving confederate money worth less than thirty cents on the dollar, and then retaining that without investment until it became entirely worthless.

As to the first ground, it is obvious to remark that the evidence of the defendant himself shows that he treated the trust fund as his own, and mingled it with his own. He kept no account and could render no account. He cannot state at what rate of interest the trust money was loaned, and with the exception of Simmons Harrison, he does not name any person to whom it was loaned. When the loan was returned to him in confederate money by the representatives of Harrison, he makes no pretense of keeping the funds separate from his own. In fact they had before that time been mingled with his own, so as to be indistinguishable. It seems evident from defendant's own testimony that he thought he would discharge his trust by paying over to complainant the interest yearly, and then upon the death of her husband, paying over to her the principal. He therefore kept no account of the trust funds, but mixed and loaned them with his own. It does not appear that he ever took a note payable to himself as trustee, or that the evidences of debt received by him for the loan of trust funds had any ear mark by which to distinguish them from his own. In fact he states distinctly that he mixed his own funds with the trust funds in making his loans. A trustee is not permitted to so treat the trust property. When he does so, he becomes debtor to the trust, and if there is a loss, it is his loss and not the loss of the trust estate.

It has been held that where the subject of a trust is money, the trustee, in making a deposit of it in a bank, should be careful

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to do it to the account of the trust estate and not to his own account; for should he deposit it to his own account, he would render himself liable for it on the failure of the bank. *Wren v. Kirton*, 11 Ves. Jr., 377; *Matter of Stafford*, 11 Barb., 353; *McAllister v. Commonwealth*, 30 Penn. St., 536.

If the trustee deposits the trust funds in his own name, he thus mixes them with his own private funds which always renders him liable in case of loss. *Lupton v. White*, 15 Ves. Jr., 432; *Chedworth v. Edwards*, 8 id., 46; *Duke of Leeds v. Earl of Amherst*, 20 Beav., 239; *Fellows v. Mitchell*, 1 P. Wms., 81; *Auburn Seminary v. Kellogg*, 16 N. Y., 83; *Spear v. Tinkham*, 2 Barb. Ch., 211; *Stanley's Appeal*, 8 Penn. St., 431.

2. But suppose the defendant had kept the trust funds distinct from his own, that he had loaned them separately and taken evidence of debt to show that the money loaned belonged to the trust, was he justified under the circumstances detailed in the evidence in receiving repayment of the loan in confederate notes?

When Harrison's representatives paid up the money borrowed by their intestate in March, 1863, confederate notes were worth less than thirty cents on the dollar, according to the statement of the answer. According to the same authority, it was impossible to invest them in any permanent or valuable property.

A trustee who lends good money and receives it back in such a pretense for a currency ought to be able to show good reason for so doing. No stress of public opinion, no odium or unpopularity arising from a refusal to take such currency would justify him in thus dissipating the trust estate. Nothing but compulsion would justify a trustee in such a course. *Horn v. Lockhart*, 17 Wall., 581.

There was no law of the confederate states obliging the defendant to receive confederate treasury notes.

They were not even made a legal tender. No law of the state of Alabama compelled the defendant to receive such currency. And the testimony fails to satisfy me that a trustee, refusing to receive funds of the trust estate in such a depreciated currency, would have been subjected to any injury of person or property, and nothing short of such compulsion would have justified the trustee in thus administering the trust estate.

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The defendant claims, however, that by a verbal understanding with his father, the testator, he agreed to receive no compensation for his discharge of the duties of the trust, and that he was to manage the business of the trust with the same care as he did his own, and that having done that, he is discharged from liability, notwithstanding the loss.

In reply to this, it is sufficient to say that the trust is created by will, and cannot be modified by verbal understanding had between the trustee and the testator. Nor does the fact that the trustee agreed to manage the trust without compensation relieve him from the consequences of his mismanagement. Under the will by which the trust was created, the defendant was entitled to compensation. He cannot relieve himself from liability for mismanagement by now saying that he did not charge or expect compensation.

Finally, it is insisted that under the will by which the trust is created, the trust money was to be kept in the hands of the trustee until the death of the husband of the complainant, and then paid over to complainant, that the bill prays, among other things, that the trust fund be paid over to complainant, her said husband being still in life; that this prayer is contrary to the terms of the trust, and ought not to be granted, and that no other relief than that prayed for can be administered, even though there is a prayer for general relief. I cannot yield assent to this proposition.

“The usual course is for the plaintiff, in this part of his bill, to make a special prayer for the particular relief to which he thinks himself entitled, and then to conclude with a prayer of general relief at the discretion of the court. The latter can never be properly or safely omitted, because if the plaintiff should mistake the relief to which he is entitled in his special prayer, the court may yet afford him the relief to which he has a right under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill.” Story’s Eq. Pl., sec. 40, and cases there cited.

My conclusion is, therefore, that there should be a decree for complainant, establishing the trust, removing the trustee, and decreeing him to pay over the trust fund with interest, to a suit-

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able person to be appointed trustee in his stead, and referring the cause to a master to ascertain and report the amount of the trust fund, including the interest, which has not been already paid by the trustee.

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1. A vessel is unseaworthy that is not manned by the necessary officers and crew, but no recovery can be had against her on that account for a loss that was not attributable to such deficiency.
2. The fact that a vessel without having encountered any tempestuous weather suddenly springs a leak within twenty hours after leaving port, so that her officers are compelled, in order to save her from sinking, to throw overboard more than one-third her cargo, raises the presumption that she was unseaworthy when she commenced her voyage.
3. The fact that a vessel is not a common carrier does not relieve her from the warranty implied in a contract of affreightment, that she is sound, staunch and seaworthy.
4. When the underwriters have paid the loss, a suit may be maintained in the name of the insured for their benefit, against the vessel through whose fault the loss occurred.

ADMIRALTY APPEAL.

On November 7, 1871, the libellant, The West India and Pacific Steamship Transportation Company, limited, had possession of and a special ownership in 889 bales of cotton in the city of New Orleans, which it desired to have transported and delivered to the steamship Australian, lying in Mobile bay. At the date named, the steamer Planter was lying in the port of New Orleans and her master received on board of her, from the libellant, the 889 bales of cotton to be transported and delivered as aforesaid.

Early in the evening of November 7, the Planter left the port of New Orleans with the cotton on board. She proceeded on her voyage that evening and night, the weather being neither stormy nor unusually rough. A little before day of the morning of November 8, the Planter, then being in Mississippi sound, was examined and found not to be leaking. As soon, however, as she got opposite one of the passes between the gulf

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and the sound, where the water was rougher, at about 6 o'clock, A. M., she was found to be leaking rapidly. All her pumps were at once set going, but they could not keep down the water. The master headed her for the land, but she soon became waterlogged and unmanageable, and came to anchor in ten feet water. It soon became apparent that she must be lightened or she would sink. Accordingly 359 bales of cotton were thrown overboard. The consequence was, that the leakage diminished, the pumps gained on the water and the steamer became manageable, and was run into the port of Ocean Springs. The next day, having been pumped dry, she proceeded on her voyage and delivered the residue of her cargo in good order to the Australian. Of the cotton jettisoned, seven bales were lost. The others were recovered in a damaged condition. To recover for the loss and damage was the purpose of this suit.

Messrs. Wm. G. Jones and Peter Hamilton, for libellant.

Messrs. Thomas H. Herndon and John Little Smith, for claimants.

WOODS, Circuit Judge. The libellant claims, that by the contract of affreightment, there was an implied warranty of seaworthiness on the part of the master and owners of the Planter, and that at the time of the receipt of the cotton on board, and during the voyage, she was unseaworthy; (1) because she was not staunch and sound, and (2) because she was not provided with the necessary officers and crew; and that being unseaworthy, she must be held to respond in damages for the loss.

It is unnecessary to consider whether the Planter was fully manned or not, because there is no evidence that any deficiency of officers and crew contributed to the disaster, and without such proof there can be no recovery. 2 Parsons on Mar. Law, 142, 143, note 1; 151, note. I therefore proceed to consider the question, Was the Planter staunch, sound and seaworthy at the time of the contract of affreightment?

That she did not make the voyage and deliver her cargo according to the contract of affreightment is not disputed. Without having encountered any tempestuous weather, she suddenly sprung aleak within less than twenty hours after leaving

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port, so that her officers were compelled, in order to save her from sinking, to throw over more than one-third of her cargo. These facts raise the presumption that she was unseaworthy when she started, and throw on claimants the burden of proof to show that she was seaworthy. 2 Pars. Mar. Law, 138, 139; 1 Arnold on Ins., 689, 690, 691. This the claimants have attempted to prove by evidence tending to show, that in coming through the canal leading from New Orleans to the lake, she ran upon a snag or her wheel picked up a stump, and that in consequence one of her knuckle chains was broken, by which the seams along her keelson were opened.

The evidence on this point is the merest conjecture. There is no proof that the knuckle chain was broken at that time, and the effect attributed to the breaking of the knuckle chain by the witness for claimant is denied by some of the witnesses for libellant.

It is in evidence, that there were six or seven knuckle chains in the Planter. The breaking of a single chain would not, it seems to me, be sufficient to account for the results which followed.

But the conclusive answer to the theory of the claimants, that the vessel sprung aleak from the breaking of one of her knuckle chains, after the voyage commenced, is found in the following facts: Early in October, 1871, about one month before the voyage from New Orleans to the Australian, the Planter made a trip from Stockton, on the Tensas river, above Mobile, to New Orleans, with a quantity of wood and lumber, making a cargo of about one-third her capacity. She ran from Stockton to the obstructions at the head of Mobile bay over smooth water with no unusual leakage. She lay all night at the obstructions, and next day proceeded down the bay. A stiff norther commenced to blow and the waves to run high. She had not proceeded more than ten miles down the bay when she commenced to leak rapidly; so much so that it was necessary to run her in towards the western shore in shallow and more quiet water. She was brought to anchor with her head to the wind, and all her pumps set going. After a few hours she was clear of water and proceeded on her voyage.

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These two voyages of the Planter demonstrate, it seems to me, that there was some material defect in her hull, from which, whenever she encountered a rough sea, she sprang aleak.

When the Planter was docked, a few days after her trip from New Orleans to the Australian, she was found to have a rotten plank under her fender in which were holes of considerable size. These holes were a foot above the load-water line, and could not be discovered from the inside on account of the sheeting, nor from the outside on account of the wheel and fender. The situation of these holes appears to account for the fact that she did not leak in smooth water, and to account for her sudden leakage when she got into rough water.

My conclusion from the evidence is, therefore, that when the contract of affreightment was made, and the cargo received on board, the Planter was not staunch, sound and seaworthy.

It is conceded by the claimants that when a vessel is a common carrier, there is an implied warranty of seaworthiness, but they say that this warranty does not arise unless the ship is a common carrier.

In my judgment, the authorities do not sustain this view. The warranty of seaworthiness does not depend upon the common law notions of a common carrier. The common law does not give a lien upon the instrument of carriage; there is no lien on a railroad car or wagon. The rule insisted on by libellant is the creature of the admiralty, and exists in all cases of affreightment on vessels. The vessel is hypothecated to the shipper for his security that the contract will be performed by the ship, viz: that the ship will carry the goods in safety, in due season, and by the proper route; that she is in all respects seaworthy, and has a proper master and crew who will take good care of the cargo and properly deliver it. The vessel is subject to a lien in favor of the shipper that he may enforce this contract, as well as the goods to the vessel, for the payment of charges for carriage. 1 Parsons on Ship. & Adm'ty. 171, 172, and notes; *The Keokuk*, 9 Wall., 517; *Dupont de Nemours & Co. v. Vance*, 19 How., 162; *The Rebecca*, Ware, 188; Flander's Mar. Law, sec. 204.

I am of opinion, therefore, that the fact that the Planter was

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not a common carrier does not relieve her owners from the implied warranty that she was staunch, sound and seaworthy.

It is objected by claimants that the libellant had insurance on the cotton, and, having been paid for the loss, cannot maintain this action.

The record shows insurance, but does not show payment of the loss. But if libellant had been fully paid, this suit might be maintained in his name for the benefit of the underwriters by way of subrogation. 2 Phill. on Ins., secs. 1723, 1724, 1725, 1728 and 1729; *Hall & Long v. Railroad Companies*, 13 Wall., 367; *Hart et al v. Western Railroad Corporation*, 13 Met., 99; *Garrison v. Memphis Insurance Co.*, 19 How., 317.

My conclusion is, therefore, that there must be a decree for libellant for the value of the seven bales of cotton lost, and for the damage sustained by the 352 bales jettisoned and recovered, deducting therefrom the amount due as freight upon the cotton actually delivered to the Australian.

JUNE TERM, 1875.

W. S. COPLEY vs. THE GROVER & BAKER SEWING MACHINE
COMPANY.

A private corporation is liable in an action for malicious prosecution.

This was a suit brought by the plaintiff against the defendant corporation to recover fifty thousand dollars damages for a malicious prosecution.

The allegations of the complaint were,

First, that the defendant maliciously, and without proper cause therefor, caused an affidavit to be made before G. M. Parker, mayor of Mobile, and ex-officio justice of the peace, charging plaintiff with the crime of embezzlement, and causing a warrant to be issued by said G. M. Parker for the arrest of said

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plaintiff, and upon which warrant he was arrested and imprisoned for one day, viz: on the 1st day of October, 1872, and which said charge, and the prosecution thereof, by indictment of plaintiff before the city court of Mobile, was fully determined and ended on the 15th day of April, 1874, by the acquittal of plaintiff upon the trial of said charge and indictment before the city court of Mobile; and

Second, that the defendant maliciously, and without probable cause therefor, caused an indictment to be found by the grand jurors of the county of Mobile, impaneled by the city court of Mobile, at the February term, 1873, of said court, which indictment charged plaintiff with the crime of embezzlement, and said prosecution by indictment was ended on the 15th day of April, 1874, by the acquittal of plaintiff on the trial of said indictment in the city court of Mobile, and the plaintiff was thereupon discharged from said indictment and prosecution.

A demurrer was interposed by the defendant to the complaint, the main ground of which was that the defendant, being a corporation, was not liable to be sued in an action for malicious prosecution.

Messrs. E. H. Grandin and J. P. Southworth, for plaintiff.

Messrs. D. C. Anderson and Thos. H. Herndon, for defendant.

BRUCE, District Judge. The authorities are very clear that in an action for malicious prosecution, two things are essential to be established by the plaintiff:

1. The absence of all probable cause for such a prosecution on the part of the defendant; and

2. That the prosecution was malicious. See 2 Greenleaf on Evidence, sec. 453; 1 Hilliard on Torts, 420; *Ewing v. Sandford*, 21 Ala., 157.

The position of the defendant's counsel upon the demurrer is: That the action being for a malicious prosecution, into which malice enters as an essential element and ingredient, cannot be maintained, because the defendant is a corporation—an artificial person—a mere legal entity and creature of the law, and incapable of malice.

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In other words, there is no liability in an action like this, in which malice is the essential and distinguishing characteristic.

In support of this position, a number of authorities were cited, chief among which is the case of *Owsley v. The Montgomery and West Point Railroad Co.*, 37 Ala., 560.

I have examined this case with some care, and deem it proper in announcing the conclusion to which I have arrived, to make some comments in regard to it.

The Judge, R. W. WALKER, in delivering the opinion of the court in the case, says:

"It was supposed at one time that an action for a tort would not lie against a corporation, but this idea was long since exploded, and the tendency of the law in our day is to extend the application of all legal remedies to corporations, and to assimilate them as far as possible in their legal duties and responsibilities to individuals."

Accordingly, the justice proceeds to say: "The modern authorities have established the doctrine that trover, trespass *quare clausum fregit*, and trespass for an assault and battery, will lie against a corporation." Many authorities are cited in support of this doctrine, and the concluding sentence of the paragraph is: "And upon the same reasoning a corporation may be sued on trespass for false imprisonment." Now this shows the advance that has been made upon the old doctrine that an action for a tort would not lie against a corporation.

It seems now to be well settled that an action in trover, trespass, or for false imprisonment, will lie against a corporation, though it may not be settled, so well at least, that an action on the case for malicious prosecution will lie against a corporation.

Malice is an ingredient in both kinds of actions, but the distinction is, that in the former, legal malice, as contradistinguished from express malice only, is necessary to maintain the action, while in the latter, express or actual malice must be alleged and proven.

In the decision under consideration it is thus stated:

"The distinction seems to be between acts injurious in their effects, and for which the actor is liable without regard to the motive which prompted them; and conduct, the character of

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which depends upon the motive, and which apart from such motive cannot be made the ground of legal responsibility." And the justice continues thus: "If this distinction is well taken, it would follow that since a corporation as such is incapable of malice, it is not liable to be sued for a malicious prosecution."

The justice concludes his opinion in the following words, which seem to me to indicate some doubt in his mind as to the correctness of the conclusion to which he arrived. p. 564:

"And such appears to us to be the better opinion, although we are aware that there are authorities which seem to sustain the idea that an action for a malicious prosecution may be maintained against a corporation." And he cites authorities which he says seem to support this view, to which I have not had access, except one case, to which I shall presently refer.

In a state court, I might feel bound by this decision, for though, as before intimated, it seems there is some doubt fairly inferable from the language of the judge as to his own convictions on the subject, and another view is expressly recognized by him.

Still the decision is made, and the counsel have cited it and other authorities from Alabama and elsewhere, which sustain the doctrine of that case, some of which, especially of the earlier decisions, do not go so far as the one now under consideration.

This question involves the construction of no state statute or constitutional provision, but is a general principle of law, in the solution of which we are not bound by the decisions of the supreme court of our state, however able they may be.

I now refer to the case of the *Philadelphia, Wilmington & Baltimore Railroad Co.*, plaintiffs in error, *v. Phillip Quigley*, 21 How., 202, as holding a different doctrine from that claimed by the defendant's counsel in this case; and a different doctrine from the case of *Owsley v. The Montgomery & West Point Railroad Co.*, and which is one of the references of Justice WALKER, in the opinion in that case, which he says, "seems to sustain the idea that an action for a malicious prosecution may be maintained against a corporation."

This was in the court below an action brought by Quigley, de-
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fendant in error, against the railroad company, for the publication of a libel.

The opinion of the court in this case was delivered by Justice CAMPBELL. In discussing the subject the justice says: "The powers of the corporation are placed in the hands of a governing body, selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it.

"As a necessary correlative to the principle of corporate powers and faculties, by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives."

Again, he continues: "The result of the cases is, that for acts done by the agents of a corporation either *ex contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible as an individual is responsible under similar circumstances."

This is not the same case as the one at bar. It is for the publication of a libel. This action is for a malicious prosecution; but, is not the principle the same?

It will not be denied that malice enters into and is an element in slander or libel.

Slander or libel is an injury inflicted with a wicked and malevolent motive, and malice seems to be as much an essential ingredient in an action for slander and libel, as is an action for malicious prosecution.

If this is correct, then it follows that a corporation, being by this decision capable of malice to such an extent, as that a suit for the publication of libel can be maintained against it, then by parity of reasoning, a corporation is capable of malice to such an extent as that a suit for a malicious prosecution can be maintained against it.

It is proper to say that in this case, Justice DANIEL dissents from the opinion of the court delivered by Justice CAMPBELL, and the view of the subject which he presents is very much the same as that held by the defendant's counsel in this case.

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This doctrine is, I think, supported in the opinion of the court, in the case of the *State v. the Morris & Essex Railroad Co.*, 3 Zab., 360.

The case at bar, however, does not fall strictly within the principle decided in that case, which was that an indictment would lie against a corporation aggregate for a misfeasance or nonfeasance of duty. But when the justice, in delivering the opinion of the court, goes on to say as he does: "that the result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person," I think he may be justly regarded as supporting the view of the supreme court of the United States in 21 Howard.

In 2 Hilliard on Torts, 322, I find the same doctrine:

"It may be added, as a rule perfectly established and applicable alike to all wrongs and forms of action, that corporations are liable for injury caused by unlawful acts and neglects of their servants and agents done in the course and in the scope of their employment, or where under like circumstances an individual would be liable, subject however to the following limitations: 'To render a corporation liable for the wrongful acts of its officers, it must appear that they were expressly authorized to do the act, and that it was *bona fide* done in pursuance of a general authority, in relation to the subject of it, or adopted or ratified by the corporation.' "

With such examination of this subject as I have been able to give it, I think it is clear that the modern authorities have made a decided departure from the line of decisions in the earlier cases.

The late decisions all recognize that an advance has been made from the old doctrine that corporations were not liable for torts.

It seems to be well settled that corporations are liable to indictment for nonfeasance and misfeasance of duty; also that they are liable to be sued in trespass in a civil action for false imprisonment, and to this point the decisions in Alabama and in other states have gone.

But I am not content to rest here. The case cited from 21 Howard, and other authorities cited above, seem to me to go a step beyond, and to have reached the point that corporations are held for the wrongful and tortious conduct of their agents and

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employés, to the same measure of responsibility as natural persons.

It is true a corporation is an intangible, impersonal thing. It has no hands of its own with which to commit crime, and no personal identity by which it can be arrested and taken into custody and punished. It can not, as a natural person, be guilty of the higher grades of crime, such as treason, murder, perjury, but we have seen that it can be indicted for nuisance, misfeasances and nonfeasances of duty, and also that civil suits in trover, trespass on the case for false imprisonment, may be maintained against it even under the decisions in Alabama. Now can any good reason be given why it should not be held liable in an action on the case for a vexatious suit or malicious prosecution?

The answer is, that a corporation is incapable of malice, and technically that may be true; but is it really and practically so? There must be a controlling and governing power in every corporation.

This is usually found in a board of directors who are chosen by the members or stockholders, and this board in some way selects the officers and employés of the corporation.

It is not true that a corporation has no mind. Its mind is the joint product of the minds of its officers and directory in a united organization, and in point of fact corporations bring into their service the highest order of ability and the best executive talent in the country. In one sense, it is true, they have no body, no tongue and no hands; but with able management and immense profits on business, they find tongues and hands swift to do their bidding.

Does the fact of the aggregation of many persons together in a common enterprise, employing large capital, furnish us with any reason to believe that the persons who control and manage these great engines of power in society and government will not or may not sometimes use their power for improper or even malicious purposes? I think no one will say so, but rather the contrary.

On this question there is, as we have seen in this brief review, some conflict of authority, but the tendency of judicial opinion is clearly marked, and even if it may not be admitted to be the

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settled law of the country, to my mind it is the better opinion; that actions for malicious prosecutions will lie against corporations aggregate.

The demurrer is overruled.

N. S. WILLIAMS, Adm'r, vs. THE MOBILE SAVINGS BANK.

1. A bill of exchange, drawn by a bank in Mobile while that city was in possession of the confederate forces, on a bank in New Orleans, after that city had surrendered to and was occupied by the federal forces, is void.
2. Such a bill is void, even though the payee of the bill, at the time he received it, supposed the city of New Orleans was still occupied by the confederate forces.
3. But where the payee of a bill of exchange paid therefor to the drawer the face value thereof, without knowledge of the fact that the territory where the drawee resided had fallen into possession of a government at war with the government of the drawer, and it turned out that by reason of that fact the bill was void: *Held*, that the payee was in no fault, and could recover from the drawer, on the common counts, the money paid for the bill.

On the 15th of May, 1862, the plaintiff's intestate took from the defendant, the Mobile Savings Bank, at Mobile, Alabama, a bill of exchange, of which the following is a copy:

"State of Alabama, Mobile Savings Bank, Mobile, May 15, 1862. No. 4491. Pay to order of A. A. Williams, Ten Thousand Dollars.
C. W. GAZZAM, Cashier.

"To the Bank of New Orleans, New Orleans, La."

This bill was afterwards indorsed by the payee to the order of Payne, Huntingdon & Co., and was by them transferred back to Williams, the payee.

This suit was brought by the administrator of the payee, against the Mobile Savings Bank, to recover the money paid for the bill.

The first count of the complaint was for money had and received. On this the defendant took issue.

The second count alleged that Williams, the plaintiff's intestate, being a citizen of West Baton Rouge, in the state of Louisi-

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ana, on the 15th of May, 1862, while passing through Mobile, Alabama, deposited \$10,000 with the defendant, and took from it a bill, being the bill above described, and at that time said intestate did not know that the city of New Orleans had fallen into the possession of the army of the United States; that he proceeded to his home in West Baton Rouge, Louisiana, and inclosed said bill to Messrs. Payne, Huntingdon & Co., of New Orleans; that before the draft reached them, Gen. Butler, then in command of the United States forces at New Orleans, issued a proclamation declaring martial law in said city, and declaring Confederate States currency valueless, and prohibiting its circulation as currency; and that in consequence it became valueless in New Orleans; and that about the 26th of May, 1862, Gen. Butler gave to the Bank of New Orleans, upon which the bill was drawn, permission to return to the said defendant all Confederate currency or bonds held by said Bank of New Orleans which belonged to the defendant, and the defendant did then and there withdraw and take full possession of all its funds in said Bank of New Orleans, and left nothing with which to pay said bill, but withdrew the identical funds upon which said bill was drawn, and has not since made any provision for the payment of said bill or any part of it, nor had the defendant any right to expect the same would be paid.

The third count was substantially the same as the second.

The fourth count claimed \$10,000 as due from the defendant upon the said bill of exchange, and it averred that it was presented for payment to the proper officer of the Bank of New Orleans after the city of New Orleans fell into the possession of the forces of the United States, and payment was refused. The count then averred that before the late civil war was terminated, to wit: in May, 1862, the defendant withdrew the identical funds on which the bill was drawn, and, at the same time, closed its accounts and dealings with the Bank of New Orleans, and has never since had any money in said bank with which to meet said draft; and the defendant has not since made any provision for the payment of the draft, nor had it any right to expect that the Bank of New Orleans would pay it.

The fifth count is based on the bill of exchange, of which a

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copy is given, and it is averred that it was presented for payment and payment was refused, and the bill was protested and due notice given to defendant.

The sixth count was predicated on the bill of exchange, and avers that the identical money in the Bank of New Orleans upon which the bill was drawn was withdrawn by defendant, and that defendant withdrew at the same time all its money from the Bank of New Orleans, and left no money to pay the bill. The common money counts were added.

Demurrers were filed to the second, third, fourth, fifth and sixth counts. The ground of demurrer was that the claims mentioned in these counts were shown to be founded on a consideration declared by the law of the land to be illegal and invalid, and that said bill of exchange was drawn in violation of the laws and policy of the United States.

Messrs. Wm. Boyles and G. Y. Overall for plaintiff.

Messrs. R. H. Smith, R. I. Smith and P. Hamilton, for defendant.

Woods, Circuit Judge. There can be no doubt, it seems to me, that the bill of exchange, upon which some of the counts are based, is void, and no action can be maintained upon it.

It is a part of the public history of the country, and it has been expressly held by the supreme court of the United States (*The Venice*, 2 Wall., 258; *The Ouachita Cotton*, 6 id., 521), that the city of New Orleans was subjugated and brought under the control of the federal forces on the 6th of May, 1862. It continued in the possession of the federal army until the close of the late war of rebellion. At the time the bill sued on was drawn, Mobile, where the drawer—the Mobile Savings Bank—resided, was within the confederate lines. The bill, therefore, was one drawn by a party within the confederate lines, requesting the payment to the payee by a party within the federal lines, of the sum of \$10,000. The bill was therefore void. *Griswold v. Waddington*, 16 Johns., 438; *Phillips v. Hatch*, 1 Dill., 571; *Montgomery v. United States*, 15 Wall., 399; Woolsey's Commentaries on International Law, sec. 117; *Britton v. Butler*,

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11 Am. Law Reg., 293; *Ouachita Cotton*, 6 Wall., 521; *Woods v. Wilder*, 43 N. Y., 164.

An attempt is made to take the case out of the rule by the averment in the second and third counts to the effect that at the time of taking the bill the plaintiff's intestate did not know that the city of New Orleans, which was the residence of the drawee, had fallen under the control of the federal forces. I do not think this helps the plaintiff's bill. The rule which makes a bill given under these circumstances void is founded on the most imperative considerations of public policy. It is to prevent any intercourse across the lines of the contending armies, or any temptation to intercourse, and it is to prevent the enemy from drawing means to carry on his war from within the territory of the state with which he is at war. It was against public policy to allow a bank within the Confederate States to withdraw its assets from within the lines of the United States. It is therefore immaterial whether or not Williams, the intestate, at the time he received the bill, knew that it was drawn upon a bank which was then within the federal lines. The public interest demanded that such bills should not be drawn, no matter what the parties knew or did not know.

The counts of the declaration, therefore, which are based upon the bill of exchange, cannot be maintained, and the demurrer to them is well taken. These are the fourth, fifth and sixth.

The common money counts are of course not open to the objection that they are founded on a void paper. Nor do I think the second and third counts are. These counts are not based upon the bill, but upon a deposit of money made by the plaintiff's intestate, for which he received a void bill of exchange. The second and third counts seem to me to be rather counts for money of plaintiff's testator, had and received by defendant, for which the plaintiff's intestate had taken a bill of exchange, the issuing of which was against public policy, and therefore void.

The second and third counts, therefore, present the question, whether, under the circumstances of public history, and the facts detailed in these counts, the plaintiff can recover back the money which he paid for the void bill.

It is a general and well settled rule of law, that where parties

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have been engaged in an illegal transaction, the courts will not aid either of them, but will leave them where they have placed themselves. *In pari delicto, melior conditio possidentis. Meyers v. Meinrath*, 101 Mass., 366. See 2 Rob. Pr., 478, where the cases on this subject are collected.

But it seems to me that the averment made in the second and third counts that plaintiff's testator, at the time he received the bill, had no knowledge that the city of New Orleans had fallen under federal control, takes the case out of this rule. It is when parties are in fault that the law refuses to aid them.

If the bill had been drawn before New Orleans fell, the transaction would have been a lawful one. The plaintiff avers that his intestate, when he took the bill, did not know the fact that the city of New Orleans had fallen. There was, therefore, no purpose on his part to violate any law or public policy. He ought not to be punished. He is in no fault. Why should he lose the money which he paid over to the bank when he supposed he was doing a perfectly lawful act?

It seems to me that under the circumstances stated in the second and third counts, it would be against equity to allow the bank to hold on to the money, and that there is no rule of law which forbids the plaintiff from recovering it. The distinction here drawn is taken by the adjudged cases.

Thus, it has been held in an action on a promise to indemnify, that if the act directed or agreed to be done is known at the time to be against law, an express promise to indemnify would be void. But if it was not known at the time to be unlawful, the promise to indemnify is a good and valid promise. See 2 Rob. Pr., 299-300, and numerous cases there cited.

If the Mobile Savings Bank had knowledge of the fall of New Orleans, while the plaintiff's intestate was ignorant of it, and the bank put off on him a bill which was rendered void by the fact of the fall of the city, it seems clear that the plaintiff could recover the money, for the parties would not be *in pari delicto*, and it would be a most unconscionable fraud to allow the bank to keep the money of the plaintiff's intestate in such a case. But suppose neither party to the transaction had knowledge of the facts which made it illegal; then neither party is in fault,

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and there is no rule of law or of public policy which forbids the courts from placing the parties *in statu quo*. It would, under such circumstances, seem to be the case of money paid under a mistake of fact, which might be recovered back.

In accordance with these views, the demurrers to the fourth, fifth and sixth counts are sustained, and the demurrers to the second and third are overruled.

DECEMBER TERM, 1875.

JOHN C. STANTON et al., Trustees, vs. THE ALABAMA & CHATTA-
NOOGA RAILROAD COMPANY et al.

1. Where a decayed and dilapidated railroad and its appurtenances are in the possession of receivers by authority of a decree of court, made in a cause brought by trustees of a first mortgage to foreclose the same, and it is necessary to borrow money in order to preserve the road and complete some inconsiderable portions thereof, and to put it in condition for the transaction of its business, the court may authorize the receivers to borrow money for such purposes, and make the sums so borrowed a lien on the railroad property superior to that of the first mortgage.
2. The order of the court authorizing the receivers to borrow money prescribed that they should issue for the money borrowed, certificates payable in ten years, bearing eight per cent. interest, payable semi-annually, and that the same should not be sold or disposed of for less than ninety cents on the dollar. The receivers issued certificates payable to bearer, and which referred to the order of the court by authority of which they were issued. *Held*,
 - (a) That such certificates were not commercial paper, good in the hands of *bona fide* holder, no matter what vice or infirmity might attend their original issue.
 - (b) That they were good for the amount of money actually paid for or advanced on them to the receivers in accordance with the terms of the order of court.
3. Persons who bought said certificates, or advanced money on them to the receivers, were not bound to see that the money was applied to the purposes of the trust.
4. When such certificates were hypothecated by the receivers to secure moneys advanced to them, and their face value greatly exceeded the sums borrowed, the court ordered that the certificates not necessary at ninety cents on the dollar to secure the sums so advanced should be returned to the receivers.

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5. Receivers who willfully and corruptly exceed their powers are liable for the actual damage sustained by reason of their misconduct, but for nothing more.
6. Exceptions to the report of a master should be precise, and raise well defined issues. When they are vague and general, and require of the court the performance of duties which properly belong to the master and counsel, they will be overruled.

IN EQUITY.

The bill in this case was filed by the trustees of a first mortgage deed executed by the defendant railroad company to secure its first mortgage bonds for the purpose, among other things, of bringing to sale the property conveyed by the mortgage, and to the end that the proceeds of the sale might be applied to the payment of the liens upon said property according to their priority. Before this time, trains had been running upon the road from one terminus to the other, but a portion of the road had been built in a hasty and temporary manner, and needed to be completed in a substantial and permanent way, in order to insure the safety of the trains. Such proceedings were had in the cause, that on the 26th day of August, 1873, a decretal order was made by Mr. Circuit Justice BRADLEY, whereby Lewis Rice of Massachusetts and Wm. J. Haralson of Alabama were appointed receivers to take possession and control of the mortgaged property, with authority "to put said railroad and other property in repair, and to complete any incompleted portions thereof; to procure rolling stock, machinery and other necessary things for operating the same, and to operate the same to the best advantage," and save and preserve the same for the benefit of the first mortgage bondholders, and others having liens thereon.

These receivers were, by the same decretal order, authorized to borrow or advance moneys, not exceeding \$1,200,000, which were to be a first lien on said mortgaged property prior to all others, and to be paid before the said first mortgage bonds.

For the money so raised, for the purposes aforesaid, the receivers were authorized to issue certificates, the principal payable in ten years from the first day of September, 1873, with interest payable semi-annually, at a rate not exceeding eight per cent. per annum. These certificates were not to be sold or disposed of for

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less than ninety cents on the dollar of their face value, and were not to be issued until countersigned by a majority of the trustees for the first mortgage bondholders, without which countersigning they were not to be entitled to the lien and priority aforesaid.

Under this order, the receivers went into possession of the road, and managed the same, and issued and disposed of nearly all the certificates authorized to be issued by them.

On the 23d of January, 1874, this court ordered, adjudged and decreed that the entire line of said defendant company's road, as the same was described in the mortgage deed, extending from Chattanooga, Tenn., through Georgia and Alabama to Meridian, Miss., with all accessories thereto at the time of sale, should be sold at public vendue by the commissioners named in the decree of the court.

The decree of the court further directed, that in case of a sale the proceeds should be applied,

First. To the payment of the expenses of the trust, and the costs of suit, etc.

Second. To the payment of all taxes, assessments, charges and liens prior in law to the lien of the said mortgage deed, and

Third. To the payment of the first mortgage bonds, with their unpaid interest coupons.

Fourth. The residue, if any, to be applied in such order and priority of distribution as the court should thereafter establish.

This decree also directed a reference to Joseph W. Burke, Esq., to report in detail all the amounts necessary and proper to be paid out of the proceeds of the sale under the four heads above specified; and the sale of the road was postponed to await the coming in of the report.

On the 24th day of August, 1874, by a decretal order of Mr. Circuit Justice BRADLEY, which recited that the operation of the railroad, which was the subject of the litigation in this case, had nearly ceased in consequence of disasters from the elements and want of necessary repairs, and that said road and its equipments were fast deteriorating in value, the possession of the said railroad and its appurtenances was turned over to the trustees of the said first mortgage deed, namely, Daniel N. Stanton, John C.

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Stanton and Francis B. Loomis, the complainants in this cause. This order declared that the trustees "are authorized, for the purposes before mentioned, to raise any moneys which may be advanced to them (beyond the advances which have already been made thereon) upon any of the certificates issued or authorized to be issued under the decree of August 26, 1872, which certificates, for all amounts justly due thereon, according to the final decree in this cause made on the 23d of January, 1874, or which may become due thereon by such further advancements, are hereby declared to be entitled to priority over the said first mortgage bonds, and all other claims against said railroad and other property, as declared in said final decree, and the sale to be made by the masters named in said decree shall be subject to the lien of said certificates," etc.

On the 18th of June, 1874, Mr. Burke, the master, filed his general report, and on the 31st of May, 1875, his supplemental report, under the decree of reference heretofore recited. Afterwards, and before any exceptions to these reports were heard, on the 11th of June, 1875, the persons representing the first mortgage bondholders, the trustees of said mortgage and the holders of receivers' certificates, issued by the receivers appointed in this cause, entered into an agreement which, on the day last named, was made by Mr. Circuit Justice BRADLEY an order of the court. This order recited that there was some dissatisfaction with the reports of Master Burke, and provided for the appointment of Mr. Philip Phillips, of Washington City, as master, to enquire into, and with power to settle the various matters of reference involved in the case and ordered by the decrees of the court, which settlement, it was declared, should be final between the parties to the said agreement when confirmed by the court.

It was further agreed and decreed that if any of the receivers' certificates were objected to by either party, the master should inquire and report whether the same were issued in accordance with the orders in the cause, what disposition was made of the same, whether said disposition was in conformity to the said orders, and which in his opinion should be allowed and which rejected.

On the 8th of September, 1875, Mr. Phillips filed his report,

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to which a large number of exceptions were taken by counsel for various persons interested; and on these, the case was submitted to the court. Most of the exceptions raised questions of fact, and they are not noticed in that part of the opinion of the court which follows.

Mr. John A. Elmore appeared for the trustees as complainants.

Mr. E. H. Grandin also appeared for the trustees, and for J. C. Stanton individually and as receiver.

Mr. J. Q. Smith appeared as counsel for complainants in the bill.

Mr. Wm. Boyles appeared for F. S. Gwyer, a holder of receivers' certificates.

Mr. S. F. Rice, for Messrs. Rice and Haralson, receivers.

Mr. V. A. Gaskill appeared for the trustees D. N. Stanton and J. C. Stanton, and J. C. Stanton as receiver.

Messrs. Robert H. Smith, R. I. Smith and Thomas W. Snagge, of London, England, appeared for the council of foreign bondholders, a corporation of London, in the kingdom of Great Britain; for certain persons known as the Frankfort Committee of the Alabama & Chattanooga Railroad Company and other persons, holders to the amount of \$3,200,000 of the first mortgage bonds issued by the railroad company.

Woods, Circuit Judge. The most important exceptions to the report of Master Phillips have been filed by the solicitors of the contesting first mortgage bondholders, and these will be first considered and disposed of in their order.

The first of these relates to what are designated the hypothesized receivers' certificates. In order to understand the exception, it is necessary to set out briefly the facts as stated by Master Phillips, and his conclusions of law thereon:

"The complainants in the bill," says the master's report, "were the trustees of the first mortgage bondholders. The bill prayed that the court would determine the various matters in dispute; that they would appoint receivers with full power to borrow money, and with such other powers as might be necessary to cause the property to be protected, improved and administered

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until the further order of the court; and that in the meantime the said road should be operated, and the business of the company be prosecuted, to the greatest advantage for the benefit of all interested.

“The solicitors for the second mortgage bondholders, who were defendants in the cause, united in the application for the appointment of receivers as prayed for.

“There were also annexed to the bill numerous affidavits showing the dilapidated condition of the road, and the absolute necessity for the preservation of the property that the order should be made.

“Under these circumstances, Mr. Circuit Justice BRADLEY made the decretal order of August 26, 1872, appointing Rice and Haralson receivers with powers as prayed for.

“The order provides, ‘that all moneys which may be raised by the receivers by loan, or which may be advanced by them for the purposes aforesaid, not exceeding the sum of \$1,200,000, shall be a first lien, to be paid out of the proceeds of said property.’

“Having thus designated the amount that might be raised, the order proceeds to provide the ways and means:

“‘The receivers shall issue certificates for the money which they may thus raise by loan, and the loans shall be made on such terms as the receivers may deem expedient, provided that the said certificates shall not be disposed of for less than ninety cents on the dollar; and provided, also, that the interest shall not be allowed at a greater rate than eight per cent.’

“This is followed with further direction, ‘that the principal of any moneys so to be loaned to the said receivers shall be payable at the expiration of ten years from the 1st of September next, at some convenient place to be named therein.’

“The power of the court to make this decree is not now open to inquiry, but the master is very confident in the opinion that if any case could ever justify the exercise of such a jurisdiction, the one before him imperiously called for its exercise.

“Under this order, the receivers issued 1,200 certificates, numbered from one to twelve hundred inclusive, for one thousand dollars each.

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"They are made payable to bearer, but on their face they recite that they are made 'under and in pursuance of an order of Judge BRADLEY, of the 26th of August, 1872, in a suit in equity, in the circuit court of the United States, at Mobile, for the district of Alabama, fifth judicial circuit, in which said Seth Adams et al., trustees, are complainants, and the Alabama & Chattanooga Railroad company et al., are defendants.'

"These certificates thus conclude: 'In witness whereof, the said receivers in pursuance of the order aforesaid, and not otherwise, have signed these presents on this fifth day of September, 1872.'

"They are thus indorsed:

'We do hereby certify that this is one of the series of certificates of indebtedness of \$1,000 each, and numbered consecutively from No. 1 to 1,200, both numbers inclusive, amounting in the whole to \$1,200,000, and the same is now countersigned by us in pursuance of the order of court, in the cause pending in the United States circuit court for the district of Alabama, as mentioned herein.' "

This was signed by the trustees.

It was argued that these certificates, being payable to bearer, were negotiable instruments by the law merchant, and that the parties who had in good faith purchased them in open market, held a title which could not be invalidated by any illegality in their disposition by the receivers. To sustain this proposition the following cases were relied on: *Woods v. Lawrence Co.*, 1 Black, 386; *City of Lexington v. Butler*, 14 Wall., 512; *Mercer Co. v. Hackett*, 1 id., 83; *Grand Chute v. Winegar*, 15 id., 356; *Gelpcke v. Dubuque*, 1 id., 203; *Lynde v. The County*, 16 id., 7; *Meyer v. Muscatine*, 1 id., 385; *Lee County v. Rogers*, 7 id., 181.

This view the master refused to adopt, but held that the title of every holder was dependent on the fact whether the certificate was disposed of by the receivers in conformity with the order of the court, and that it was not to be regarded as falling under the law of ordinary negotiable paper. His report declares:

"These securities until within a few years were unknown; they are all directed to be issued by special appointees of the

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court, clothed with special and limited authority, and in relation to a particular case.

“On their face they refer to the particular power thus conferred, and to the particular case then pending in the court.

“This is a sufficient notice to put a prudent dealer on inquiry.

“The order imperatively declares that the certificate should not be disposed of at less than ninety cents on the dollar. Any act by the receivers which disposes of these at less than ninety cents is *ultra vires*.

“The first taker would derive no title from such a transaction and a subsequent holder would occupy no better position. These certificates may be likened to the English debentures of a business corporation, as to which it has been well settled that, when issued by the directors without due authority under the seal of the company, they cannot be enforced by members of the company who accepted them after being present at the meeting when the irregular issue was sanctioned, and a *bona fide* transferee of such debentures from such shareholders will stand in no better position, nor can strangers or their assignees enforce them where they were accepted by the first holders, with knowledge that the condition on which they were issued had not been fulfilled. *Re Magdalena Steam Nav. Co.*, Johns. (Eng. Ch.), 690.

“In very many instances, as shown by the evidence, money was advanced in New York to the receivers, for which they executed their notes, dating them at Boston to avoid the usury laws, and stipulating to pay, exclusive of 8 per cent. interest, $2\frac{1}{2}$ per cent. per month, with a pledge of certificates often exceeding double, and sometimes treble the amount loaned, with authority to sell the certificates at public or private sale without notice.

“The commissioner is of the opinion that such a pledge was wholly unauthorized.

“The proviso that the certificates shall not be disposed of at less than ninety cents is certainly violated by pledging twenty certificates for a loan of \$10,000.

“Such a hypothecation deprives the receivers of their control over the certificates; it is a disposition which defeats the object of the order, which is to enable the receivers to obtain for the

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use of the road \$1,000,000, if so much were needed, by the use of \$1,200,000 in certificates.

"To hold such a disposition to be legal would confer a valid title upon all who claim under the first taker, and thus the lien of the first mortgage bondholders would be displaced in charging the trust estate with double or treble the amount of money actually advanced for its betterment.

"While entertaining these views, the commissioner is of opinion, that to the extent of moneys actually advanced to the receivers, and applied to the benefit of the trust estates, they are entitled on equitable principles to be allowed. It has been decided in England in accordance with the views here expressed that when money has been advanced on irregular securities and has been applied for the benefit of the company by the directors, and the shareholders have acquiesced in the transaction, the company and the shareholders are precluded from disputing their liability to pay the advance. And when a payment of six per cent. interest had been made upon the debentures without objection, it was held that although the holders could not recover upon the debentures, they were entitled to six per cent. interest on their advances. *De Winton v. Mayor of Brecon*, 26 Beav., 533.

"Each claimant is therefore allowed the amount of money actually advanced by him upon his delivery of the note or other evidence of indebtedness held by him on this account, and also all the remaining certificates which had been given to him in pledge after retaining as many of them at ninety cents as will extinguish the amount found due to him, the coupons belonging to said certificates being excised therefrom, so as to conform to the computation of interest made on such indebtedness.

"If the views herein expressed meet with the approbation of the court, then to give full effect to them and bring this litigation, so injurious to all interested, to a speedy conclusion, it is recommended that an order be made fixing a day for the completion of these settlements, and in default of settlement on that day, the trust estate shall be declared freed from all liability thereon."

The bondholders have excepted "to the allowance of each and every certificate hypothecated, and to every allowance as a lien

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prior to the first mortgage debt of any sum raised by the hypothecation of said certificates, and to the allowance and payment of any of said several sums on receivers' certificates at 90 cents, on the dollar."

The grounds of this exception are that the transactions of the receivers in hypothecating certificates were unlawful, beyond the powers of the receivers, and in violation of the orders of the court, were usurious and in fraud of the trust, and that it is not shown that the moneys raised by the several transactions were applied to the purposes specified in the orders of the court or to the benefit of the trust; were without proper consideration, and that the master by his report has attempted to make a new contract between the parties and the effect of his ruling is improperly to charge the trust fund with liens prior to the first mortgage.

I do not think that any of these objections to the conclusions of the master on this subject are well taken.

I entirely agree with the master that these certificates have not the quality of negotiable instruments by the law merchant. In my judgment, power conferred upon receivers to issue certificates does not authorize the issue of a bond or other negotiable instrument which shall be good in the hands of a *bona fide* holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued and not by the form the receivers may choose to give it.

In order to get a correct view of the subject, we must recur to the order of the court authorizing the receivers to borrow money and issue certificates. It will be seen by the decree already quoted that the receivers were authorized to raise by loan or to advance themselves a sum not exceeding \$1,200,000, which should be a first lien, prior to all others on the trust property; that they were to issue certificates for the money thus raised by loan, and that the loan should be made on such terms as the receivers might deem expedient, "provided that the certificates should not be sold at less than 90 cents on the dollar of their face, and should not bear a greater interest than eight per cent. per annum, payable half yearly, and that the certificates should not be

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issued until countersigned by a majority of the trustees for the first mortgage bondholders, without which countersigning they should not be entitled to the lien and priority aforesaid."

If the report of the master is adopted, the loan of money made on these certificates will be secured for the benefit of the trust, in full compliance with the terms of the decretal order of the court, namely, at 8 per cent. per annum, payable half yearly on certificates having ten years to run, and if the fund already raised does not reach the amount authorized by the court to be borrowed, a sufficient number of certificates will be released to raise the amount ordered.

Unquestionably the receivers had no right to hypothecate the certificates, or to agree to pay more for money borrowed than eight per cent., payable semiannually. They had no authority to borrow money to be paid before the expiration of ten years from the first of September, 1872, the date when the certificates were to fall due. But there was no period fixed during which the money must of necessity be borrowed; they could borrow it as needed, at any time within the ten years.

If the receivers were now in office they might, under the order of the court already referred to, borrow money on any certificates in their hands, to be repaid according to the terms of the certificates, on the first of September, 1882. In fact, under the decretal order of August 24, 1874, made by Mr. Circuit Justice BRADLEY, the trustees of the first mortgage to whom the railroad was ordered to be delivered, as *quasi* receivers, were authorized to raise money on any certificates remaining in their hands. The result therefore of the ruling of Master Phillips is to effect a loan of money for the benefit of this trust estate on the precise terms authorized by the order of the court, and to put in the hands of the trustees as receivers, certificates on which the residue of the loan authorized by the court can be raised.

This cannot be said to be the making of a contract by the master. The terms of the loan have long since been fixed by the court, and if the holders of hypothecated certificates choose now to come in and assent to these terms, the bargain is of their and not of the master's making.

I do not think that the lenders of money on hypothecated cer-

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tificates were bound to look after the application of the money loaned to the receivers. They can be compelled to allow their money to go on the terms prescribed by the orders of the court; that is, to consent to a loan payable September 1, 1882, at eight per cent. per annum, payable semiannually, and to take certificates as evidence thereof, at not less than ninety cents on the dollar. But their money cannot be confiscated, because receivers, appointed by the court at the instance of the trustees, for the bondholders, may have been unfaithful to their trust.

But in my judgment, the question raised by this exception has been already settled by this court. The decretal order of Mr. Circuit Justice BRADLEY, made August 24, 1874, already referred to, by which the trust property was turned over to the trustees as *quasi* receivers, among other things, declared: "And it is further ordered that said trustees, having filed said bond and taken possession as aforesaid, shall be authorized for the purposes before mentioned to raise any moneys which may be advanced to them, beyond the advances which have already been made thereon, upon any of the certificates issued or authorized to be issued by the receivers in this cause, under the decree of August 26, 1872, which certificates for all amounts justly due thereon, according to the final decree in this cause, made on the 23d day of January last, or which may become due thereon by such further advances, are hereby declared to be entitled to priority over the said first mortgage and all other claims against said railroad and other property as declared in said final decrees, and the sale to be made by the masters named in said decree, shall be subject to the lien of said certificates," etc.

The purpose of this order is unmistakable to recognize "advances" made on certificates already issued, or which were authorized to be, but had not yet been issued. The amounts of the advances were not fixed. They might be ninety cents on the dollar, or a smaller sum. Whatever they were they were declared to be the first lien upon the trust property. This question therefore, having been passed upon by one of the judges of this court, will be considered as settled until reversed in an appellate tribunal.

The exception under consideration must be overruled.

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The next exception to be noticed is to so much of the report as refers to the account of Rice and Haralson, receivers. The grounds of exception are, (1) The refusal of the master to charge Rice and Haralson with the face value of 726 certificates hypothecated by them. (2) His refusal to charge said certificates at ninety cents on the dollar; and (3) The allowance to the auditor, treasurer, and general superintendent and other officers and agents of extravagant salaries and compensation, the same being included in the items allowed the receivers.

The overruling of the exception just passed upon, in effect disposes of the first two grounds on which this exception is based. If the trust property is charged only with the amounts actually advanced on the hypothecated certificates, and the certificates not necessary to secure the amounts thus advanced are ordered to be returned to the trustees, there is no rule of law or equity by which the receivers should be charged, either with the face value or ninety cents upon the face value of the hypothecated certificates.

The damage, if any, sustained by the conduct of the receivers, is not to be measured in the manner suggested by this exception.

If they acted in good faith, but under a mistaken view of their powers, they would perhaps not be liable at all. If they willfully and corruptly exceeded their powers, they should only be held liable for the actual damage sustained by their conduct, and they are not chargeable by an arbitrary rule like that suggested by the exception. *Skerrrett's Minor*, 2 Hogan, 192.

The other ground upon which this exception is based is, that extravagant salaries were allowed the auditor, treasurer, and general superintendent, and other officers and agents employed by the receivers.

This branch of the exception is too vague and general, and requires of the court the performance of duties which properly belong to the master and counsel.

Exceptions should be precise, and raise well defined issues. The exceptor in this instance should have stated what officers were referred to, and what salaries were allowed them. Instead of this, the exception is launched at the compensation generally of the auditor, treasurer, general superintendent and all other

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officers and agents of the receivers, without stating what salary or compensation was allowed to any one of them. It is impossible for the court to pass intelligently on such an exception, and no rule of equity practice requires the court to make the effort to do so.

The entire exception is therefore overruled.

T. H. DAVENPORT VS. THE RECEIVERS OF THE ALABAMA & CHATTANOOGA RAILROAD COMPANY.

A person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road is not entitled to payment out of the earnings of the road, or the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers.

This was a petition filed by Davenport against the receivers of the Alabama & Chattanooga Railroad, in the principal cause, which was entitled John C. Stanton and others, Trustees v. the Alabama & Chattanooga Railroad Company and others. The original bill was filed by the trustees to foreclose the first mortgage on the road, and other property of the railroad company. The court made a decretal order, appointing Lewis Rice and Wm. J. Haralson receivers, and placing the road in their possession. The substance of this order will appear in the opinion of the court. While Rice and Haralson were in possession as receivers, the petitioner Davenport was injured while traveling on the road as a passenger. He got leave of this court to sue the receivers in their official capacity, in a state court, to recover damages for the injuries received by him. He recovered a judgment for \$3,000, and then filed the present petition against the present receivers, who were the successors of Rice and Haralson, for an order of the court, that his judgment be paid out of the earnings of the road, or the proceeds of its sale, as a part of the expenses of executing the trust. The road had not paid running expenses, and the proceeds of the sale fell far short of paying the first mortgage bonds.

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Messrs. Thomas H. Herndon and John Little Smith, for the petitioner, cited *Kerr on Receivers*, 164; *Meara's Adm'r v. Holbrook*, 20 Ohio St., 137; *Potter, Receiver, v. Bunnell*, 20 id., 150.

Mr. John A. Elmore, representing the trustees of the first mortgage, and *Mr. Robert H. Smith*, representing the bondholders, *contra*.

Woods, Circuit Judge. The claim is for \$3,000 and costs, on a judgment rendered as damages, for an injury received by Davenport while traveling as a passenger on the Alabama & Chattanooga road, when it was run by the receivers Rice and Haralson.

The question is, whether such claim can come in as a lien on the fund, superior to the first mortgage in existence, when the right to damages accrued.

It is too clear for argument, that if the road had been run by the president and directors when the injury was sustained, no such claim could have priority. The party would have traveled over the road, taking the risk of the ability of the company to respond, just as every man, who obtains a right or contract, does so with the risk of the ability of the party to answer to him.

The receivers of the court were merely appointed to act instead of the president and directors, except so far as the orders of the court otherwise direct, and the liability stands on the same footing as if it had been created by the president and directors, unless a higher right can be assigned to it under the orders of the court.

The object of appointing a receiver is to take care of the property for those entitled to it, and he has no powers except such as are conferred upon him. In other words, he acts as special agent by appointment of the court. *Kerr on Receivers*, 3, 46.

A receiver stands like an administrator who certainly can by no act override existing liens, and he is under no personal liability to respond except for his own personal neglect. *Meara's Adm'r v. Holbrook, Receiver*, 20 Ohio St., 137. This case is cited for petitioner. It holds that there is no personal liability on the receivers, and that the liability must be discharged from funds in their hands, but by no means settles that liens on such funds are subordinated to such later liabilities.

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The estate in the hands of a receiver must bear the loss, but only such estate as is liable for the loss, and not the estate of one who holds a paramount lien.

Lord Eldon, in *Norway v. Rowe*, 19 Ves. Jr., 153, declares that the appointment of a receiver does not prejudice the rights of a prior mortgagee, and then uses this language: "And the constant habit of the court upon such a motion (to appoint a receiver) is not to look at mortgagees farther than to take care that they are not prejudiced."

In Redfield on The Law of Railways, vol. 2, p. 363, the proposition is thus distinctly stated: "The appointment of the receiver does not operate to derange the priority of legal or equitable liens. The money in his hands is in the custody of the law, for whoever can make title to it, and when the party entitled to the estate is ascertained, the receiver will be his receiver."

The case, therefore, comes down to this: Does the decree of Circuit Justice Bradley, of August 26, 1872, or the decree of foreclosure of January, 1874, establish such liens? And it may be stated thus: Has Justice Bradley departed from a well settled rule of law, to create a lien not essential to running the road, and not necessary for increasing, either directly or consequentially, the rights of the first mortgage bondholders, for the protection of whose rights the appointment was made?

It is clear that such a lien is not one of the incidents to running a road, nor was its creation necessary to procure traffic and travel; nothing of the kind is intimated in the application for a receiver, and no such view or idea is presented in the order, an analysis of which will make this clear.

The order of the circuit justice recites that the property is deteriorating in value, and being wasted and scattered and destroyed, whereby the security of the first mortgage bondholders, and the interest of all other persons then concerned in said property are subject to hazard, danger and sacrifice. It then recites the impossibility to dispose of the property in its then present condition without great sacrifice, and the proposal and agreement of the parties * * "that a receiver or receivers shall be appointed in this cause, to take charge of said property and put the same into proper condition for its preservation and

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disposition, for the mutual benefit of all parties interested therein.

“And whereas, in view of all the evidence and admissions of the parties, the court is satisfied that a receiver or receivers ought to be appointed to take charge of the entire property and manage the same, and to put the same in order and repair, to prevent the entire destruction thereof:”

Therefore it was ordered that receivers be appointed: 1. To take possession, recover and receive the property covered by the first mortgage. 2. To sue for damages done to it, etc. 3. To put the property in repair, and to complete the road, and to procure rolling stock, etc., necessary to operate it, “and to operate the same to the best advantage, so as to prevent the said property from further deteriorating, and to save and preserve the same for the benefit and interest of the said first mortgage bondholders, and all others having an interest therein.”

Then follows the creation of the prior lien, and it is for money raised or advanced “for the purposes aforesaid.”

The order then, in words, provides: “That any funds raised by said receivers, by loan as aforesaid, or received by them from any other source, as such receivers, which may not be employed or required for the purposes above mentioned, or allowed to them by the court for their services as such receivers, shall be paid by them into this court, for the use of the said first mortgage bondholders, as their interest or principal shall become due.”

We here have an explicit declaration that no money is to be used by the receivers except for the purposes above mentioned.

Now is it necessary, in order to operate the road, that any man entitled to his action for injuries should have a prior lien on the road for such damages? And is the lien to be created by inference, and on conjecture that the creation of such a lien was necessary in order to operate the road. As a fact, it is known that almost every railroad in the United States is under mortgage, and that every such one is operated without being subject to a lien for such liabilities.

There is not one word in the inducements recited for the appointment of the receivers, or in the purposes named for which

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they were appointed, which, by the remotest inference, countenances the creation of a prior lien.

The exercise of power by a court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts.

The party has a right to be paid from the fund remaining, after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining. He has the same right against the property which he could have had if the road had been run by the president and directors when his right accrued, and none other.

Turning to the decree of foreclosure of January, 1874, we see how clearly the court viewed the order of the circuit justice in the light presented.

It devotes the proceeds of sale, first, to necessary expenses incident to the execution and due prosecution of the trust created in behalf of the mortgagee, etc.

But it cannot be said that the giving of a prior lien to a traveler for damages is an expense incident to the execution of the trust which was created in behalf of the mortgagees. Such a claim is in fact no "expense" at all, in the proper or ordinary sense of the word. It is a liability resulting secondarily from operating the road and that is all.

The petition must be dismissed.

JOHN C. STANTON et al., Trustees, vs. THE ALABAMA & CHATTANOOGA RAILROAD COMPANY et al.

1. A purchaser of railroad bonds is bound to take notice of what appears upon the face of his bonds, and of the mortgage made to secure them.
2. But if the bonds and mortgage, which put the purchaser on inquiry, lull and satisfy inquiry, he is bound to look no further.
3. A railroad company executed a mortgage to secure a series of numbered bonds, all bearing the same date and payable at the same time, not to exceed sixteen bonds of one thousand dollars each to the mile of its road.

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Five hundred bonds, in excess of this limit, purporting to be secured by this mortgage, were issued by the company and sold for value to *bona fide* holders. *Held*, (a) That bonds of this kind are numbered, not for the purpose of giving one number any advantage over another, but simply for convenience in registration and identification. (b) In such a case, the five hundred bonds bearing the higher numbers stand on the same footing as those bearing the lower numbers; and when the mortgaged property is inadequate to pay, all are entitled to share *pro rata* with the others in its proceeds.

IN EQUITY.

Heard upon petition of certain bondholders.

The case was this: The defendant company was a corporation of the state of Alabama, whose existence and franchises had been recognized by legislation in the states of Tennessee, Georgia and Mississippi. The company was authorized to construct and use a railroad running from Chattanooga in the state of Tennessee, across the states of Georgia and Alabama to Meridian in the state of Mississippi.

An act of the legislature of Alabama, approved September 22, 1868, required the governor of the state, whenever any railroad company of the state should have finished, equipped and completed twenty continuous miles of railroad, to indorse on the part of the state, the first mortgage bonds of the railroad company to the amount of sixteen thousand dollars per mile, for the portion thus finished and completed, and to indorse the same bonds at the rate of sixteen thousand dollars per mile for each section of five miles subsequently completed and equipped. The act also applied to railroads constructed beyond the limits of the state of Alabama by any railroad company organized under the laws of the state.

The act further provided: "Nor shall such bonds be indorsed by the governor until the president and chief engineer of such company, upon oath, show that the conditions of this article have been complied with in all respects." Secs. 1417 and 1422, Rev. Code of Alabama.

On the 19th day of December, 1868, the above mentioned acts being in force, the Alabama & Chattanooga Railroad Company conveyed to trustees, to secure its first mortgage bonds, its entire railroad, extending from Chattanooga, Tennessee, to Me-

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ridian, Mississippi, together with all its other property, equipments and franchises. This mortgage recited, that the bonds to be secured by it were to be issued at the rate of sixteen thousand dollars per mile of said railroad.

Bonds of \$1,000 each, to the number of 5220, purporting to be secured by this mortgage, were issued for value and put in circulation by the railroad company, all bearing the same date and payable at the same time.

Each one of these bonds recited on its face, that it was one of a series of numbered bonds issued in accordance with and upon the conditions prescribed by the acts of the legislature above cited, and secured by an indorsement of the state of Alabama, and by a first lien upon the entire road and property of the railroad company.

Each bond also bore the indorsement of the governor of Alabama, which recited, that the railroad company had complied with the conditions prescribed by law, upon the performance of which the governor was required to make such indorsement.

Upon each bond was also indorsed a certificate signed by the trustees named in the mortgage, that the bond was one of the series of first mortgage bonds described in and secured by said mortgage deed.

The railroad company having made several defaults in the payment of interest, the trustees of the first mortgage deed filed the bill in this case to foreclose the mortgage and bring the railroad property therein described to sale to pay the principal and interest on the bonds, the principal having become due by the default in the payment of interest.

On the 23d of January, 1874, a decree of sale was made by the court, and on the first Monday of May, 1875, the property was sold by the master appointed for that purpose, and bid off and purchased by the trustees of said mortgage deed for the benefit and in behalf of all holders of the first mortgage bonds secured thereby.

It appears by evidence on file in the case, and is not disputed, that the railroad of the defendant company, between Chattanooga and Meridian, is only 295 miles long. At the rate of sixteen thousand dollars per mile, the terms of the mortgage only

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authorized the issue of 4720 bonds of \$1,000 each, and the governor was only authorized to indorse that number. Five hundred bonds more than this number were indorsed by the governor and issued and negotiated by the railroad company.

The holders of the bonds which bear numbers higher than 4720 have applied to the court for leave to file their bonds and become sharers in the title to the property bought by the trustees. This petition is resisted by the holders of bonds numbered from 1 to 1720 inclusive, and upon this issue thus presented this branch of the case was heard.

Mr. Samuel Dixon, of Philadelphia, and *Messrs. Thomas H. Herndon and John Little Smith*, for petitioners:

1. The petitioners are *bona fide* holders of bonds which are negotiable instruments before maturity, and their title cannot be impeached except by affirmative proof of bad faith on their part in the acquisition of them. *Goodman v. Harvey*, 4 Ad. & E., 870; *Swift v. Tyson*, 16 Pet., 19; *Peacock v. Pursell*, 14 C. B. (N. S.), 728; *Pettice v. Prout*, 5 Gray, 502; *Woodman v. Churchill*, 52 Me., 58; *Stotts v. Byers*, 17 Iowa, 303; *Lyon v. Ewing*, 17 Wis., 61; *Baker v. Walker*, 14 Mees. & W., 465; *Belshaw v. Bush*, 11 C. B., 191, 200; *Housum v. Rogers*, 40 Penn. St., 190; *Palmer v. Richards*, 1 Eng. L. & E., 529; *Ford v. Bush*, 11 Q. B., 273; *Bank of New York v. Vanderhost*, 32 N. Y., 553.

2. As against these holders, there is no infirmity in the bonds. The corporation is estopped and therefore liable to pay the bonds and the bonds are entitled to share in the security provided by the trust deed, equally with other bonds secured thereby. *In re Athenæum Life Assurance Co., ex parte Eagle Co.*, 4 Kay & J., 549, cited in Green's Brice's *Ultra Vires*, 433; *Mon. National Bank v. Globe Works*, 101 Mass., 57; *Akin v. Blanchard*, 32 Barb., 527; *Royal British Bank v. Turquand*, 6 E. & B., 327; *Know v. Aspinwall*, 21 How., 544; *Woods v. Lawrence County*, 1 Black, 386; *Moran v. Miami County*, 2 id., 724; *Mercer County v. Hackett*, 1 Wall., 83; *Supervisors v. Schenck*, 5 id., 772; *Railroad Co. v. Howard*, 7 id., 413.

Mr. P. Hamilton, with whom appeared *Mr. Thomas W. Snagge*, of London, England, and *Mr. T. A. Hamilton*, contra:

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1. The evidence before the petitioners when they purchased, to authenticate the bonds, does not tend to establish the right asserted against the *bona fide* holders of other bonds to participate with them in an inadequate security. It may very well be that the bonds held by petitioners are perfectly irreproachable and beyond attack, and yet the bonds not be secured by the mortgage in this case. *Philadelphia & Sunbury Railroad Co. v. Lewis*, 33 Penn. St., 33.

2. The face of the bonds put the holders on inquiry as to the extent of the security which had been provided for their payment and the amount of the debt for which that security was pledged, and the mortgage shows that it was executed to secure bonds to an amount not exceeding sixteen thousand dollars per mile. The length of the road is 295 miles; the debt secured by the mortgage can therefore only be \$4,720,000 or 4,720 bonds of \$1,000 each. When, therefore, parties present bonds of higher numbers, their bonds show on their face that they are not secured by the mortgage.

Woods, Circuit Judge. It is conceded that the petitioners are holders of the high numbered bonds for value and without actual notice of any infirmity attaching to them.

These bonds are commercial paper, and as such are binding upon the railroad company when in the hands of a *bona fide* holder for value. *Commissioners of Knox County v. Aspinwall*, 21 How., 539; *Woods v. Lawrence County*, 1 Black, 386; *Mercer County v. Hackett*, 1 Wall., 95; *Gelpcke v. Dubuque*, id., 175; *Van Hostrop v. Madison City*, id., 291; *Meyer v. Muscatine*, id., 384; *Murray v. Lardner*, 2 id., 110. By the same authorities they are equitably binding upon the state by reason of its indorsement.

Neither the railroad company nor the state enter into this controversy. The contention is between bondholders; the parties who hold bonds bearing numbers less than 4721 insisting that their bonds only are secured by the mortgage, and what they style the overissue or high numbered bonds are not secured. The claim of the holders of bonds bearing numbers below 4721 is based on two grounds: first, because the petitioners holding

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the high numbered bonds were put on notice of the fact that their bonds were not secured by the mortgage; and second, because by the very terms of the mortgage these bonds are not secured by it; that mortgage declares what bonds it is intended to secure, and these bonds are not among them.

1. Were the holders of the overissue or high numbered bonds put on notice of the fact that the bonds they held were in excess of what the terms of the mortgage deed authorized?

The power of the railroad company to issue bonds was unlimited. It could issue as many as it chose. The bonds are therefore binding upon the railroad company. Were the holders of the bonds put upon sufficient notice of the facts that bonds held by them were not secured by the mortgage?

The holders of the bonds were bound to take notice of what was contained in or indorsed upon their bonds; they were bound to take notice of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage. *Royal British Bank v. Turquand*, 6 E. & B., 327.

Upon a reference to this mortgage deed, the purchaser of bonds would have learned that the mortgage was only intended to secure bonds at the rate of \$16,000 per mile. He was, therefore, bound to reasonable diligence to find out whether his bonds were secured by the mortgage deed or not.

By a perusal of the laws of the state referred to in the mortgage, and also upon the face of the bond, he would have learned that the governor of the state of Alabama was authorized to indorse the bonds of the railroad to the amount of \$16,000 per mile of completed railroad; that the oath of the president and chief engineer of the railroad company as to the number of miles of completed railroad was required to be filed with the governor as the evidence of the fact that so many miles had been completed, and that he was authorized to act on that evidence in making his indorsement. By a reference to the bonds, they would have seen that the governor had indorsed them and recited in his indorsement that he had done so in pursuance of law; they would have seen that the face of the bond recited that it was one of a series of numbered bonds, issued in accordance with the laws of the state above recited, secured by the indorsement of the governor,

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made in pursuance of the same laws, and was a first lien upon the railroad and other property of the railroad company, and they would have seen that the bonds bore the indorsement of the trustees named in the mortgage deed, to the effect that they were the bonds described in, and secured by the said mortgage.

So it would seem that the very bonds and mortgage which put the purchasers upon inquiry lulled and satisfied inquiry. They had the right to presume that the governor had not violated his duty; that before he indorsed the bonds, he had on file the oath of the president and chief engineer of the railroad company, that a sufficient number of miles of railroad had been completed to authorize the indorsement. Besides this, they had the statement of the president and treasurer of the railroad company on the face of the bond, and of the trustees for all the bondholders upon the back of the bond, that the bonds were secured by the mortgage.

To require the purchaser to go behind the indorsement of the governor, sustained, as they had the right to presume, by the oath of the president and chief engineer of the railroad company, and the statement of the railroad company itself, made by its president and treasurer, and of the trustees who were appointed to act for all the bondholders, would be to require every purchaser of a bond actually to measure the road for himself to ascertain its length.

While, therefore, the mortgage put the purchaser upon inquiry as to the length of the road, the mortgage itself, and the bonds, with their statements and indorsements, answered the inquiry in such a way as to satisfy the most cautious and wary.

But suppose the purchaser of bonds had ascertained the length of the road for himself by actual measurement, how would that help him to know whether his bonds were outside or inside the terms of the mortgage?

The bonds all bear the same date, and fall due on the same day. Bond number one has, therefore, no advantage over any other bond, and no presumptions are to be indulged in its favor. There is no presumption of law that it was issued first or sold first. On the contrary, the presumption is that all were sold at the same time. Practically, we know that where a large number

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of bonds are put upon the market, the high numbered bonds are just as likely to be sold first as the low numbered bonds. So that if the purchaser should, before purchasing, ascertain for himself the precise length of the road, he would have no means of ascertaining whether his bonds were over issue bonds or not. The holders of the five hundred bonds highest in number would have precisely the same ground to say that the first five hundred are over issues as the holders of the first five hundred have to say this of the last five hundred.

I conclude, therefore, that while it is true that the mortgage limits the number of bonds to be secured thereby, and the holder of bonds might be required to take notice of that limitation, there was nothing to put him upon notice that the limit thus fixed had been exceeded; on the contrary, that all the presumptions and all the evidence was that it had not; nor if he had ascertained that the limit had been exceeded, was he bound to conclude from the fact that his bonds bore the higher numbers, that they were the over-issue bonds, rather than others.

But, *Second*, it is claimed that the mortgage was executed to secure sixteen bonds of \$1,000 each to the mile, and no more, and that no larger number of bonds can be secured by it than its terms authorize; that, when the officers of the railroad company had issued sixteen bonds to the mile, they had no power to issue a greater number to be secured by that mortgage, and the overissue is not secured. But the difficulty recurs that there is no way of ascertaining which are the over issue bonds. The law presumes they were all issued at one and the same time, and the purchaser has the right to act on that presumption. The bonds are numbered, not for the purpose of giving one number any advantage over another, but as a matter of convenience in their registration and identification.

The case is this: A mortgage is made to trustees to secure a given number of bonds, and as a matter of security to the bondholders, the trustees are required to place their certificate upon the bond to the effect that it is described in and secured by the mortgage. The common trustees of all the bondholders are unfaithful, and certify to a larger number of bonds than were intended to be secured by the mortgage. The result is that all

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must suffer from the unfaithfulness of the trustees. But no part of the bondholders can say that the loss shall fall exclusively on others. It is a case for the application of the rule that equality is equity. A second mortgage bondholder would have the right to insist that the first mortgage should only secure bonds to the extent of \$16,000 per mile. But no first mortgage bondholder has the right to say that he shall be paid in full to the exclusion of others whose bonds purport to be secured by the same mortgage, and whose equities are equal to his.

The views expressed are illustrated by a fact in this case. The length of the railroad constructed is, in fact, only 290 miles; five miles of the line between Chattanooga and Meridian is not the property of this road, but is leased from the Nashville and Chattanooga railroad. So that according to the mortgage, the company should have issued and the governor indorsed only 4,640 bonds; yet it issued 4,720 as for the entire line between Chattanooga and Meridian. There is, therefore, among the 4,720 bonds an over issue of 80 bonds. Now I ask what 80 bonds of the 4,720 are to be excluded from the benefit of the mortgage? There is no rule by which any can be excluded. They must all share *pro rata* in the proceeds of the mortgage property. As the proceeds of the property sold are not sufficient to pay more than one-fourth of the first mortgage bonds, no second mortgage bondholder is injured by allowing the over issue bonds to share in the proceeds, and no first mortgage bondholder can exclude any other from sharing in the proceeds.

The result is that the prayer of petitioners must be granted.

Ketchum vs. The Mobile & Ohio Railroad Company.

AT CHAMBERS, APRIL, 1876.

MORRIS KETCHUM VS. THE MOBILE & OHIO RAILROAD COMPANY
et al.

1. When a court of equity was called on for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a nonresident naked trustee, and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible.
2. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise.
3. Such a trustee who, soon after the cessation of hostilities, learns that he has been removed and another appointed in his stead, and who for a period of ten years thereafter makes no claim to his trusteeship, and does no act as trustee, will be held to have abandoned his title to the office, and to have acquiesced in the appointment of his successor.
4. Long acquiescence in a particular grievance without effort to redress it is a complete bar to relief in equity.

IN EQUITY.

Heard on motion for the appointment of a receiver of the property and effects of the defendant railroad company.

The facts, so far as necessary to the decision of the motion, were as follows:

The Mobile & Ohio Railroad Company was an Alabama corporation, having its principal office at Mobile.

On the first day of November, A. D. 1853, said company executed its deed of trust, conveying to Morris Ketchum and John J. Palmer, then of New York, and William R. Hallett, then of Mobile, and to the survivors and successors of them in fee simple, all its railroad property and franchises in trust to secure six thousand bonds of one thousand dollars each, to be issued by the company, to be payable in thirty years, with semi-annual interest.

Among the property conveyed by said deed of trust were one million one hundred and fifty-six thousand six hundred and fifty-eight acres of land, donated to said company by act of congress.

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The said deed provided that "said Ketchum, Palmer and Hallett shall at once have possession and control of said lands and any other lands that may be obtained by said company, with authority to devise and determine rules of management, of sale, of investing the net proceeds in such funds as will suitably and safely create a sinking fund for the redemption or payment of said bonds; said Ketchum, Palmer and Hallett, rendering an exhibit and account of their doings on or before the first days of January of each and every year during the period of the trust herein made to the said railroad company."

The said deed of trust further provided that "if either of them, the said Ketchum, Palmer or Hallett, shall at any time or times hereafter die, or become from any cause incapable of acting in the premises, or resign his office under these presents, then the said company or said Ketchum, Palmer and Hallett, or either of them, may select some other person to fill the vacancy occurring," etc. No provision was made by the trust deed for any compensation to the trustees. Ketchum was not and is not a bondholder, stockholder or officer of the railroad company; he was a naked trustee.

The bonds secured by this deed of trust were issued by the company and sold, some in the United States and some in Europe.

Before July, 1860, both Palmer and Hallett had died.

On the 6th of January, 1862, the railroad company filed its bill in the chancery court for the county of Mobile, in the state of Alabama, against Morris Ketchum, who was represented to be and was in fact a citizen of New York, and who was alleged to be and was in fact the sole survivor of the trustees named in said deed of trust.

The bill charged upon Ketchum, among other things, neglect of duty as trustee, refusal to unite with the company in the appointment of new trustees, that the trust property was entirely within the Confederate States, and that he was an alien enemy, that the trust property was suffering for want of a trustee capable of acting, and that the interests of the holders of bonds, secured by the trust deed, imperatively demanded the appointment of trustees residing within the territory of the Con-

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federate States who could perform the duties incident to the trust.

The bill prayed that Ketchum might be removed from his position as trustee under said deed of trust, and that the vacancies created by the death of Palmer and Hallett and the removal of Ketchum might be filled by the appointment of the court.

Upon this bill, proceedings were taken according to the code of Alabama to bring in said Ketchum by publication, notice of the filing, pendency and prayer of the bill having been made by publication according to the statute law of Alabama, and Ketchum having made default, a decree *pro confesso* was taken against him, and in due course a final decree was made removing him from his office as trustee, and appointing Charles Walsh, Geo. H. Young and Alexander Jackson as trustees under the deed of trust.

The provisions of the code of Alabama (Walker's Revised Code) under which the proceedings were taken are to be found in the code of 1852, and were in force in 1853, when the trust deed was executed, and in 1863, when the bill was filed and the decree made. Those provisions (section 3321) give the court jurisdiction over nonresidents "when the object of the suit concerns an estate of, lien or charge upon lands, or the disposition thereof, * * within this state." Section 3335 provided for service upon a nonresident by publication, and section 3455 declared that "upon the petition or bill of any person interested in the execution of a trust, the court of chancery may remove any trustee who has violated or threatened to violate his trust, * * or who, from any other cause, is an unsuitable person to execute the trust." And section 3000 of the same code provided that "such court has the authority to appoint a new trustee in the place of a trustee removed."

The trustees, appointed by the said chancery court accepted said trust and discharged the duties thereof for many years without challenge or question, were in the possession and management of the lands of said railroad company not appurtenant to the line of railroad, and sold portions thereof and made deeds therefor. They continued in said trust until the 19th of April, 1875, when said Young and Jackson having resigned, the said

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Walsh, then sole trustee, and the said railroad company, in accordance with the provisions of the deed of trust, appointed W. Butler Duncan and A. Foster Elliott, trustees under the same, who accepted the trust and at once entered upon the duties thereof.

From a period before the commencement of the late war down to the filing of this bill in this case, Ketchum did no act and set up no claim to the office of trustee. In 1865 he learned of the proceedings of the Mobile chancery court, and of the decree purporting to remove him and appoint Walsh, Young and Jackson.

The railroad company having made default in the payment of the interest due upon the bonds secured by said deed of trust, on the first days of May and November, 1874, said Duncan and Elliott, on the 8th day of May, 1875, by virtue of the provisions of said deed of trust, and the assent of the said railroad company, took full possession of all the property of said railroad company, and on the 11th of May, 1875, filed their bill in equity in this court, praying, among other things, to be confirmed in their possession and protected from all interference by any party or parties whomsoever, for leave to apply to the court for instructions in the discharge of their duties, and that the equity of redemption of the said railroad company in said railroad property, etc., might be forever foreclosed, etc.

Upon this bill the court, by its decretal order, recognized Duncan and Elliott as trustees in possession, and made various other orders directing them in the discharge of their duties as such, and appointing a master to examine their accounts and to discharge the other duties appropriate to the office of master in said cause.

After all these proceedings, and not until ten months after the filing of the bill of Duncan and Elliott, to wit, on March 14, 1876, Morris Ketchum filed the present bill, to which he made the railroad company, Duncan, Elliott and others, defendants, in which he alleged that he was the sole surviving trustee of the said deed of trust; that Duncan and Elliott had, without authority, intruded themselves into said trusteeship.

The prayer of his bill was, that the property conveyed by the deed of trust in which he is named as trustee, might be sold and

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disposed of for the benefit of the bondholders, and that a receiver might be appointed to take charge of and administer the mortgaged property until such sale could be made. The railroad company filed its plea, setting up the proceedings and decree of the Mobile chancery court, and alleged the removal of Ketchum thereby as a bar to any relief prayed by the bill.

The cause was heard on the motion of complainant for the appointment of a receiver, and upon the bill, plea and various affidavits.

Mr. Edward L. Andrews, with whom were *Messrs. Alex. Mc Kinstry, D. C. Labatt* and *B. F. Jonas*, for the motion.

Mr. Andrews argued:

I. The proceeding in the confederate chancery court of Alabama is a nullity, because it presumed to deprive a loyal citizen of the United States of his title and property on the specific ground of his loyalty. *Texas v. White*, 7 Wall., 700; *Hickman v. Jones*, 9 id., 197.

II. Said proceedings are a nullity for want of jurisdiction over Ketchum. *Shortridge v. Macon*, 1 Abb. U. S., 36; *Cuyler v. Ferrill*, 1 id., 169; *The Protector*, 9 Wall., 687; *Dean v. Nelson*, 10 id., 172; *Railroad Co. v. Trimble*, 10 id., 367; *United States v. Wiley*, 11 id., 508; *Bigler v. Walker*, 14 id., 297; *Lasere v. Rochereau*, 17 id., 437; *Masterson v. Howard*, 18 id., 99; *University v. Finch*, 18 id., 106; *Taylor v. Thomas*, 22 id., 479.

Jurisdiction can arise from two sources only: by the court taking actual custody of the property or by serving the defendant with process. There was no service of process in this case. The claim that a proceeding to remove a trustee is a proceeding *in rem* is untenable. *Miller v. Pridden*, 1 DeG., M. & G., 335; *Foster v. Goree*, 4 Ala., 440; *Railroad Co. v. Trimble*, 10 Wall., 376.

The proceeding in this case was *in personam*; service was therefore a prerequisite to jurisdiction. *Evelyns v. Foster*, 8 Vesey Jr., 96; *Anderson ex parte*, 5 id., 240; *Cooper v. Reynolds*, 10 Wall., 308; *Hollensworth v. Barbour*, 4 Pet., 470; *Harris v. Hardeman*, 14 How., 334.

Two cases precisely like the one in hand have been adjudi-

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cated by the courts of Virginia and Maryland, and the power of the courts, under the circumstances of this case, to remove a trustee, denied. *Washington, A. & G. Railroad Co. v. Alexandria & Washington Railroad Co.*, 19 Gratt., 592; *Johnson v. Robinson*, 34 Md., 165.

Messrs. Geo. N. Stewart, P. Hamilton and John A. Campbell, contra.

Mr. Stewart argued that the proceedings of the chancery court by which Ketchum was removed as trustee, were in strict accordance with the Alabama code; that the proceedings were *in rem*, and cited *Wyman v. Campbell*, 6 Porter, 219. As to the effect of decree *in rem* and acquiescence, Big. on Est., 156, 157, 158; 10 Pet., 474; *Satcher v. Satcher's Adm'r*, 41 Ala., 26; Big. on Est., 511. The war suspended Ketchum's rights. *Griffin v. Ryland and Burns, Ex'rs*, 45 Ala., 688.

Mr. Hamilton claimed that the proceedings by which Ketchum was removed, were not only according to the statute of Alabama, but also equity jurisprudence. Ketchum had actually and specifically abandoned his trust. He had done no act as trustee for ten years. A court of equity will not disturb the condition of things which has been acquiesced in for a period of years. Big. on Est., 511; 4 Pet., 471; 10 Wall., 319; *McQuiddy v. Ware*, 20 id., 14; *Lill v. Neafie*, 31 Ill., 101.

Mr. Campbell. The bill for the removal of Ketchum charged a violation of trust, neglect of duty, exorbitant demands for compensation, and inability to discharge his duties by reason of nonresidence. As war was flagrant between the sections, he was described as an alien enemy. A decree *pro confesso* was taken against him, which by the code of Alabama was an admission of the allegations of the bill. Rev. Code, sec. 3391. The proceeding was authorized by the statute of Alabama, and the statute was strictly followed. A court of chancery, by its general authority over trusts, may remove a trustee for changing his residence to a foreign state, or permanently residing beyond the jurisdiction of the court. 2 Spen. Eq. Jur., 942; *Uredale v. Ettrick*, 2 Ch. C., 129. In *Rider v. Kidder*, 13 Ves. Jr., 123, the court, upon proof of absence of the trustee ordered service to be made on the clerk of the court. In *Attorney General v.*

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Mayor of London, 3 Brown's Ch., 171, there was a trust for the advancement of christianity in America and the conversion of infidels, which had been declared before the American revolution. William and Mary College, in Virginia, and Harvard College, in Massachusetts, were the administrators of the trust. There was a suspension of payments to these corporations during the war, and at the end of the war the question arose whether they could be continued. The chancellor determined that a foreign corporation could not be retained.

The jurisdiction of state chancery courts is the same as the chancery courts of Great Britain. *Williamson v. Suydam*, 6 Wall., 723-738; *Bowditch v. Banneloo*, 1 Gray, 220; *The People v. Norton*, 5 Seld., 176; *Lill v. Neafie*, 31 Ill., 101.

The effect of the war on the powers and decrees of the courts, was not such as complainant claims. *The People v. Norton*, 5 Seld., *supra*; *Gaines v. Harvin*, 19 Ala., 498; *Suydam v. Williamson*, 24 How., 427; *Williamson v. Suydam*, 6 Wall., *supra*; *Horn v. Lockhart*, 17 id., 580.

The decree removing Ketchum did not become absolute for eighteen months, and this period was extended till 1869, by acts passed in 1866, 1867 and 1868. During this period the decree was open for review, on the application of Ketchum. A similar act was adopted after the great rebellion in Great Britain. *Sheffield v. Lord Castleton*, 2 Vern., 392. Such remedial acts have been sustained by the supreme court of the United States. *Jackson v. Lamphire*, 3 Pet., 280; *Wilkinson v. Leland*, 10 id., 294; *Watson v. Mercer*, 8 Pet., 88; *Kearny v. Taylor*, 15 How., 494; see also *Blagg v. Miles*, 1 Story, 426.

There is no power to declare that the decrees of the court of chancery are void, where the decree is within the scope of its regular jurisdiction, and it has conformed in its proceedings to the law of the land. They cannot be collaterally impeached. *Gaines v. Harvin*, 19 Ala., 491; *Budd v. Hiler*, 3 Dutch. (N. J.), 43; *Green v. Borland*, 4 Met., 330; *People v. Norton*, 5 Seld., *supra*.

WOODS, Circuit Judge. Complainant's claim is, that he is still trustee under the deed of trust, and that Duncan and Elli-

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ott are not; that the proceedings in the Mobile chancery court which took place during the war of the rebellion, and while he was a citizen of, and actually residing in New York, were entirely ineffectual to remove him from his trusteeship, which was not only an office but an estate, and were absolutely null and void; that the court, by the publication of a notice which could not lawfully reach him, acquired no jurisdiction over his person, and that its proceedings and decree in the premises are absolutely without effect.

In the cases cited by counsel for complainant, it was held that the decree of the court of a country engaged in war, by which the estate of a party was divested, who was prevented from appearing in the court, by the fact that he was outside the military lines of the country in which the court was held, and was prohibited from entering those lines, was absolutely null and void.

I think this case is clearly distinguishable from those cited by complainant. Ketchum was a naked trustee. He had no personal interest in the property conveyed to him by the trust deed. It was a property which, according to the record, cost \$20,000,000, and the *cestuis que trust* of this immense estate were scattered all over the United States and Europe. Ketchum's cotrustees were both dead, and the war which existed between the United States and the Confederate States rendered Ketchum as impotent to discharge the duties of the trust, as if he also had been dead. The interest of the *cestuis que trust* imperatively demanded the services of a trustee. In this condition of things the settler of the trust, namely, the railroad company, applied to a court of competent jurisdiction, alleging neglect of duty on the part of the surviving trustee, and stating such facts regarding the trustee as showed that it was impossible for him to discharge the duties of his trust by reason of the war then raging. The filing and averments of this bill and the subsequent proceedings and decree were in strict conformity with the statute law of Alabama, which had been enacted and was in force when the trust deed was executed.

It is true that the notice to Ketchum by publication was ineffectual to bring him into court; but does this fact ren-

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der the proceedings and decree of the chancery court absolutely void?

The court was called on to act in the conservation of an immense property lying within its jurisdiction, in which thousands of persons, among them aliens, married women, infants and trustees were interested. The court acts to preserve this property, and acts in strict conformity to the law of the land in which it sits. Can it be possible that the proceedings of the court are absolutely void because service was not made upon a naked trustee whom it was impossible to serve? Is the removal of a trustee, incapable of acting, and the appointment of another to act in behalf of such a trust, one of the class of decrees declared by the authorities to be void because the removed trustee was beyond the military lines and could not be served?

In my judgment, the chancery court, under the circumstances of this case, had jurisdiction, and it would have been its duty, even in an *ex parte* proceeding, to appoint a trustee to administer this trust. The war might have lasted twenty years, during all which time it would have been impossible to serve the absent trustee. It seems to me to be a very unreasonable proposition, that during all this time a court of chancery must see the trust estate perishing for want of a trustee, and refuse to act on the ground that a naked trustee, whom it was impossible to serve, had not been served with process.

The proceedings were not absolutely void. It was at least effectual for the valid appointment of trustees to act during the disability of the original surviving trustee, even without notice to him. *McKosker v. Brady*, 1 Barb. Ch., 329; *In re Mais*, 12 Eng. L. & E., 306; *Ex parte Hardeman*, 3 M. D. & D., 559.

This view is also supported by the language used by the supreme court of the United States in the case of *Lockhart v. Horn*, 17 Wall., 580. "We admit," says the court, "that the acts of the several states, in their individual capacities and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair, or tend to impair, the supremacy of the national authority or the just rights of citizens under the constitution, are in general to be treated as valid and binding. The existence of a state

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of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts, in the insurrectionary states, touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution."

If the decree of the Mobile chancery court was not absolutely void, it was the duty of Ketchum, as soon as peace was restored, to assert his right to the office of trustee. He says by implication, in his bill, that in 1865 he learned of the decree which purported to remove him and appoint other trustees in his stead. The laws of Alabama gave him until the 26th of June, 1869, to apply to the court to open its decree and allow him to make his defense to the bill. He never made such application. On the contrary, although important duties, such as making conveyances for lands sold, were imposed upon him by the deed of trust, although the same instrument required annual reports to be made by him to the railroad company, he never did any act of any kind under his trust, held no communication with the railroad company, its officers or agents, in reference thereto, and set up no claim to the office of trustee until the filing of his bill in this case, in March, 1876. In the meantime, the trustees appointed in his stead were active in the discharge of their duties, were making conveyances to vast quantities of the trust lands sold by the railroad company, and finally Walsh, the remaining trustee, concurred in the appointment of Duncan and Elliott, whose title to the office of trustees has been recognized by this court.

Clearly such a course of conduct on the part of Ketchum is an abandonment of any title he may have had to the office of trustee, and an acquiescence in the order of things established by the decree of the Mobile chancery court.

"When there has been long acquiescence in an irregular ap-

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AT CHAMBERS, APRIL, 1876.

MORRIS KETCHUM VS. THE MOBILE & OHIO RAILROAD COMPANY
et al.

1. When a court of equity was called on for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a nonresident naked trustee, and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible.
2. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise.
3. Such a trustee who, soon after the cessation of hostilities, learns that he has been removed and another appointed in his stead, and who for a period of ten years thereafter makes no claim to his trusteeship, and does no act as trustee, will be held to have abandoned his title to the office, and to have acquiesced in the appointment of his successor.
4. Long acquiescence in a particular grievance without effort to redress it is a complete bar to relief in equity.

IN EQUITY.

Heard on motion for the appointment of a receiver of the property and effects of the defendant railroad company.

The facts, so far as necessary to the decision of the motion, were as follows:

The Mobile & Ohio Railroad Company was an Alabama corporation, having its principal office at Mobile.

On the first day of November, A. D. 1853, said company executed its deed of trust, conveying to Morris Ketchum and John J. Palmer, then of New York, and William R. Hallett, then of Mobile, and to the survivors and successors of them in fee simple, all its railroad property and franchises in trust to secure six thousand bonds of one thousand dollars each, to be issued by the company, to be payable in thirty years, with semi-annual interest.

Among the property conveyed by said deed of trust were one million one hundred and fifty-six thousand six hundred and fifty-eight acres of land, donated to said company by act of congress.

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The said deed provided that "said Ketchum, Palmer and Hallett shall at once have possession and control of said lands and any other lands that may be obtained by said company, with authority to devise and determine rules of management, of sale, of investing the net proceeds in such funds as will suitably and safely create a sinking fund for the redemption or payment of said bonds; said Ketchum, Palmer and Hallett, rendering an exhibit and account of their doings on or before the first days of January of each and every year during the period of the trust herein made to the said railroad company."

The said deed of trust further provided that "if either of them, the said Ketchum, Palmer or Hallett, shall at any time or times hereafter die, or become from any cause incapable of acting in the premises, or resign his office under these presents, then the said company or said Ketchum, Palmer and Hallett, or either of them, may select some other person to fill the vacancy occurring," etc. No provision was made by the trust deed for any compensation to the trustees. Ketchum was not and is not a bondholder, stockholder or officer of the railroad company; he was a naked trustee.

The bonds secured by this deed of trust were issued by the company and sold, some in the United States and some in Europe.

Before July, 1860, both Palmer and Hallett had died.

On the 6th of January, 1862, the railroad company filed its bill in the chancery court for the county of Mobile, in the state of Alabama, against Morris Ketchum, who was represented to be and was in fact a citizen of New York, and who was alleged to be and was in fact the sole survivor of the trustees named in said deed of trust.

The bill charged upon Ketchum, among other things, neglect of duty as trustee, refusal to unite with the company in the appointment of new trustees, that the trust property was entirely within the Confederate States, and that he was an alien enemy, that the trust property was suffering for want of a trustee capable of acting, and that the interests of the holders of bonds, secured by the trust deed, imperatively demanded the appointment of trustees residing within the territory of the Con-

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trons and customers of the company, secured by third mortgage bonds, having little market value. The petition further stated that it was the hope and expectation of the trustees that there should be a reorganization of the company by the owners of the bonds becoming the owners of the railroad, and that for that purpose a removal of these floating claims might be desirable to the bondholders, if the same could be done on favorable conditions and with their consent.

The petitioners alleged that in their opinion, the debt could be compounded and settled at much less than its face, and that by its settlement a number of the bonds and securities of the company would be preserved from sacrifice, but that the petitioners had no authority to employ for that purpose the moneys which have come into their possession as trustees.

Petitioners did not admit that the holders of the floating debt had any legal claim upon the moneys in their hands arising from the income and receipts of the road since it has been in their hands; but they prayed for a reference to a master to report whether it was legal or proper to pay said floating debts, or any portion of them, as a compromise; that the trustees and representatives of the several classes of bondholders might be notified of the reference, and their action thereon reported to the court, and how far they consented to and approved said application, and that the master report what is prudent, legal or proper to be done in the premises.

A reference was made to the master, as prayed in the petition, and after taking testimony and hearing argument, he filed his report.

It appeared from the report, that the trustees of the several deeds of trust, executed by the railroad company, as well as the railroad company itself, were notified of the reference and were represented before the master.

The master reported the floating debt to be \$529,598.34, of which \$114,932.34 was a gold obligation.

Of this total, \$120,023 was contracted for supplies, and the residue, \$406,048.48, was received upon loans, and went into the general fund of the company, and to that extent released the accruing receipts and created a fund sufficient to meet the accru-

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ing interest. The master finds that the sum of \$327,332 thus raised was probably applied to the payment of interest.

The master further reported that, with the use of \$230,000 in money, and the use of county bonds already pledged to the payment of this floating debt, the whole could be compromised and discharged.

The master further reported that it would be equitable to use the income of the road for the purpose mentioned; and that on several accounts it would be good policy, and recommended the application of \$230,000 of the income to this object.

Messrs. George N. Stewart, Robert H. Smith and Wm. G. Jones, in support of the master's report, cited *Ludlow v. Greyall*, 5 Exch., 58.

Mr. E. L. Andrews, contra.

Woods, Circuit Judge. Briefly stated, the grounds upon which this recommendation is based by the master, and upon which the confirmation of his report was urged by counsel, are: (1), That the whole of the money represented by this floating debt has in good faith gone to the bondholders, partly and chiefly by paying their interest coupons; and as to the residue, by the improvements and betterments of the railroad property; and (2), that a large amount of the bonds of the company are hypothecated for the payment of this floating debt; and (3), that the settlement of this floating debt, by payment or compromise, is essential to such management of the property or reorganization of the company, as will preserve the valuable franchises, privileges and exemptions of the existing corporation.

I have been unable to come to the conclusion, that the recommendations of this report ought to be adopted by the court.

The debt, which it is proposed to pay out of the income of the road, is a floating debt, partly secured by bonds, etc., inferior in rank to the great mass of bonds making up the bonded debt of the defendant company. The company has failed to pay the interest on those bonds having the superior lien, and for that reason the trustees of the first mortgage have taken possession of the road for the purpose, among others, of applying its income to the payment of the interest, and if there should be a

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surplus, to the principal of these bonds. The proposition is to apply, for the reasons stated, the income which the first mortgage bondholders are entitled to, to the payment of the floating debt.

The fact that the floating debt was contracted in good faith for the benefit of the railroad company's property, and therefore for the benefit of the bondholders, is true of perhaps all such debts. But that does not give the floating debt creditors any ground upon which to claim that their debt should be paid first. *Galveston Railroad Co. v. Cowdrey*, 11 Wall., 482.

But I do not understand that the floating debt creditors claim this application of the income of the road as a legal right.

It stands simply on the ground that to refuse their payment, would be inequitable. But I cannot invade the legal rights of others to relieve the floating debt creditors from the position in which they have voluntarily placed themselves.

The facts that a large amount of inferior securities of the railroad company, now hypothecated for the floating debt, would be released by its payment, and that a reorganization of the company would be greatly facilitated and the valuable franchises of the company thereby preserved by the proposed payment of the floating debt, are doubtless strong considerations, when addressed to the bondholders themselves. But can this court waive the rights of the bondholders, because we might think it would turn out to their advantage? Can we make a contract for them, because we think it would be a good contract? Have we the power to take money which belongs to them and give it to others without their consent, because we think it would be for their interest? They have not consented to this diversion of their money, and no one who is authorized to do so has consented for them. For the trustees to undertake to give assent for the bondholders is clearly outside of their powers and duties, which are plainly prescribed in the deed of trust.

This court is, in my judgment, without any power to make the decree recommended by the report. To undertake to do it would be to invade the legal rights of the bondholders, and if established, as within the power of a court of equity, would shake the credit of railroad securities throughout the world. I must, therefore, decline to adopt the recommendations of the master.

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RUTH E. THOMPSON VS. THE KNICKERBOCKER LIFE INSURANCE COMPANY.

1. The policy issued by a life insurance company provided that promissory notes payable during the year might be given by the assured for portions of the annual premium, and declared that, in case such notes were not paid at maturity, the policy should then and thereafter be void, without notice to any party or parties interested therein, and the notes also contained the same stipulation. *Held*, that the payment at maturity of the notes given for the premium was a condition precedent to the continuance of the policy, and on a failure to pay the notes the policy became void.
2. Where it was the custom of a life insurance company to give notice to the assured that the premium or premium note was about falling due, a neglect on the part of the company to give such notice will not save the policy from forfeiture, if the assured fails to pay the premium or premium note when due, unless the failure to give notice was fraudulent, and for the purpose of throwing the assured off his guard.
3. Where a policy of life insurance, and a premium note, contained the stipulations set out in the first head-note, and the premium note was not paid at maturity: *Held*, that the insurance company was not bound to elect whether or not the policy should be forfeited, or to give any notice of such election.
4. Where it was the custom of a life insurance company not to exact punctual payment of its premium notes, but to allow thirty days' grace thereon, the company is not bound to pay the insurance money if the assured dies within the thirty days without having paid the premium note.

ACTION AT LAW.

Heard on demurrer to replications.

This suit was brought upon a policy of insurance, dated June 24, 1870, whereby the Knickerbocker Life Insurance Company, in consideration of the sum of \$410 paid in hand by Ruth E. Thompson, and a like sum to be paid by her on or before the 24th of January, in every year, during the continuance of the policy, did insure the life of John Y. Thompson, in the sum of \$5,000, for the benefit of said Ruth E. Thompson, his wife.

The complaint averred the death of John Y. Thompson, on November 3, 1874, while the policy was in force, that proof of death had been made to the company, and that all the terms and conditions of the policy had been complied with, and prayed judgment for the insurance money and interest.

To this complaint the defendant, besides the general issue,

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pleaded two special pleas, which, however, set up in effect the same defense.

The defense was in substance as follows: That the payment of the premium of four hundred and ten dollars on or before the 24th of January of each year, during the life of John Y. Thompson, was a condition precedent to the continuance of the policy. That by the terms of the policy an annual credit of a portion of the premium was provided for, and the policy contained a condition that the omission to pay the annual premium on or before noon of the 24th day of January of each year, or the failure to pay at maturity any note, obligation, or indebtedness for premium or interest due under said policy, should then and thereafter cause said policy to be void without notice to any party or parties interested therein. That the annual premium was not paid on or before January 24, 1874, and the defendant thereupon gave said Thompson time for the payment of the premium upon the condition named in the note to be hereafter mentioned, and took certain promissory notes of said Thompson for the instalments of the premium, one of which was as follows: "\$109. New York, Jan. 24, 1874. Nine months after date, without grace, I promise to pay the Knickerbocker Life Insurance Company, one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void, in case this note is not paid at maturity, according to contract in the said policy." That the terms and conditions of said note formed a part of the contract for the extension of the time given for the payment of said annual premium, that the note was not paid at maturity nor in the lifetime of John Y. Thompson, nor has it been paid since; and that said policy became null and void from and after the 24th day of October, 1874, when said note fell due, and that said John Y. Thompson died after said date, and the amount of said note has never been paid to the defendant.

The plaintiff, as authorized by sec. 2564 of the revised code of Alabama, filed four replications to these pleas.

She says: *First*, that the payment of said note was not a condition precedent to the continuance of the policy; that Thompson had the money in hand to pay the note, and intended to pay

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it, but before the maturity thereof he was taken violently ill, and before and at the time the same fell due was prostrated by fatal disease, and so remained until November 3, 1874, when he died, and during all that time was mentally and physically incapable of attending to his business, and was *non compos mentis*, and that the existence of the note was not known to plaintiff.

Second, that before said note, fell due it had long been the custom of the defendant, in like cases, to give notice of the day of payment to policy holders, and such was the uniform custom of insurance companies, and defendant had, in its dealings with John Y. Thompson, complied with such custom. Yet the defendant in this instance failed to give notice of the maturity of said note, although it knew that Thompson was in the city of Mobile, and was sick; that Thompson was ready to pay the note, had notice of its maturity been given, and that the plaintiff had no notice of the existence of the note.

Third, that on the 24th of January, 1874, said policy was renewed and extended for one year; that the note was for the residue of the premium for that year, which defendant agreed should be deferred as specified in the note; that by said agreement the policy was not to become void on the nonpayment alone of the note at maturity; but was to become void at the instance and election of defendant, and the defendant did not elect to cancel said policy or take any steps to avoid it, or give any notice of such intention during the life of said John Y. Thompson or since, and still holds said note, against the estate of said Thompson.

Fourth, that it was the general usage and custom of defendant not to demand punctual payment of said premium notes at maturity, but to give thirty days' grace, and the defendant had repeatedly so done with said Thompson and others, and this led said Thompson to rely on such leniency, and he was thereby deceived and the note was not paid.

The defendant filed a demurrer which put in issue the sufficiency of these replications as replies to the defense set up in the pleas.

Mr. John T. Taylor, for plaintiff.

Messrs. Thomas H. Herndon and John Little Smith, contra.

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Woods, Circuit Judge. The first replication presents the question whether the payment of the premium note was a condition precedent to the continuance of the policy. If no time had been given for the payment of the premium there could be no question that its payment for a year in advance was a condition precedent to the continuance of the policy for that year. The terms of the policy as set out in the pleas make this perfectly clear. Does the taking of a note for a portion of the premium change this rule and make the payment of the note a condition subsequent? That, it seems to me, depends on the agreement of the parties. If the insurance company had simply agreed to continue the policy for a year, and instead of exacting the premium in cash, had consented to take the note of the assured, payable at a future day, undoubtedly the policy would be binding even though the note were not paid at maturity. But according to the pleas, it was expressly stipulated that in case the note were not paid at maturity, the policy should become void without notice to any party or parties interested therein. Ordinarily the payment of the annual premium was a condition precedent. This was changed by dividing the annual premium for the accommodation of the assured into several payments, with the same stipulation in case of nonpayment. This was authorized by the terms of the policy. By the very terms of the contract between the parties, the nonpayment of any of the instalments into which the annual premium was divided rendered the policy void. The fact that a note had been given for the instalment does not change the case, for as soon as the policy became void the note also became invalid for want of consideration. What effect the transfer of the note by the insurance company before maturity would have upon the question it is unnecessary to decide, because no such fact appears in the case. "By taking a note for a portion of the premium, the rights and duties of the insurer and assured remain unchanged. Nor could an admission in the policy that the premium was paid preclude inquiry into the real facts." *M'Crea v. Purmart*, 16 Wend., 460; *Robert v. New England Mutual Life Insurance Co.*, 2 Bigelow, 145; *Slaughter v. Hamm*, 2 Ohio, 271; 1 Greenl. Ev., sec. 26.

We must give effect to the contract of the parties. It is plain

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and explicit, as set out both in the policy of insurance and in the note, that a failure to pay the note at maturity avoids the policy. The payment is, therefore, a condition precedent to the continuance of the policy. *Rochner v. The Knickerbocker Life Insurance Co.*, 4 Daly, 512; *Howell v. Knickerbocker Life Insurance Co.*, 44 N.Y., 276; *Patch v. The Phoenix Mutual Insurance Co.*, 44 Vt., 481; *Pitt v. Berkshire Life Insurance Co.*, 100 Mass., 500; *Anderson v. St. Louis Mutual Life Insurance Co.*, 3 Cent. Law Journal, 354; *Russum v. St. Louis Mutual Life Insurance Co.*, 3 id., 275; *Robert v. New England Mutual Life Insurance Co.*, 1 Bigelow, 634.

If the payment of the premium was a condition precedent, the fact that the assured was prevented from making payment by illness or other cause beyond his control, does not relieve him from the consequences of nonpayment. *Howell v. Knickerbocker Life Insurance Co.*, *supra*.

The fact that the plaintiff, for whose benefit the insurance was made, did not know of the existence of the premium note, does not change the rights of the parties. *Baker v. Union Mutual Life Insurance Co.*, 43 N. Y., 283.

The first replication, therefore, which denies that payment of the note at maturity was a condition precedent to the continuance of the policy and avers the fatal illness of the party whose life was assured as an excuse for nonpayment, is not a good answer to the pleas.

The demurrer to the second replication raises the question, whether, in a case where it has been the custom of an insurance company to give notice that the premium, or a premium note, is about falling due, the failure to give such notice saves the policy from forfeiture when the assured fails to pay the premium.

As a general rule, no duty is imposed upon the holder of a note or bill of exchange to give notice to the maker or acceptor of the day of payment, or to demand payment when it is due. It is the duty of the debtor to remember when his obligations fall due, and to find his creditor and pay him. The fact that the creditor has once or twice, or in a great number of instances, given notice to his debtor of the fact that his obligation was about to fall due, does not make it obligatory on him to continue

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the practice. A failure to give notice does not relieve the debtor from any of the consequences of nonpayment, unless it be averred that the custom to give notice and the omission were fraudulent, for the purpose of throwing the party off his guard. *Leslie v. Knickerbocker Insurance Co.* (N. Y. Court of Appeals), 5 Ins. Law Jour., 429; *Rochner v. Knickerbocker Life Insurance Co.*, *supra*; *Appleman v. Fisher*, 34 Md., 553. But, see *contra*, *Meyers v. Mutual Life Insurance Co.*, 4 Bigelow, 62.

The third replication alleges that after the failure to pay the premium note on October 24, 1874, the defendant company was, by its contract, required to elect, whether it would declare the policy forfeited or not, and that it made no election, and gave the plaintiff no notice of its election to forfeit the policy.

A careless reader of the replication might infer that it had reference to some contract or stipulation not already referred to in the previous pleadings. But it is not so averred in the replication; and taking the pleading most strongly against the pleader, this replication only puts a construction on the contract of the parties already set out, and does not purport to set out any new agreement.

The express stipulation of the policy was, that it was to become void without notice to any party or parties interested, in case the premium note was not paid at maturity. We cannot ignore this part of the contract. On nonpayment of the note at maturity, both the policy and the note became void. The policy might have been revived by consent of the insurance company during the life of the assured, but without such assent it remained void and of no effect. *Mutual Benefit Life Insurance Co. v. French*, 4 Bigelow, 369; Bliss on Life Ins., §§ 179, 180.

The fourth replication sets up the fact that it was the custom of the defendant not to exact punctual payment of the premium notes, but to give thirty days' grace for their payment, and defendant had repeatedly so done with said Thompson and others, and had thus led Thompson to rely on such leniency, whereby Thompson was deceived, and the note was not paid.

This replication is clearly defective in not alleging that it was the custom of defendant to consider itself bound, without payment of the premium, for thirty days, even in case of the death

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of the assured within that time. When default was made in the payment of the premium note, at whose risk was the life of the assured during the thirty days' grace? Was it the understanding of the company that if the assured died within thirty days after the maturity of the premium note, it would pay the policy whether the premium note had been paid or not? If such were the fact, it should have been so averred. As the replication now stands, its fair construction is, that it was the custom of the company to receive payment of the premium note at any time within thirty days after its maturity, provided the assured were living at the time of payment. As there is no averment that the assured paid the premium within thirty days, and before his death, the replication is clearly bad. May on Ins., §§ 352, 353, 354; *Mutual Benefit Life Insurance Co. v. Ruse*, 8 Ga., 534; *Ruse v. Mutual Benefit Life Insurance Co.*, 23 N. Y., 516; *Pritchard v. Merchants' and Tradesmen's Mutual Life Assurance Co.*, 3 C. B. (N. S.), 622.

In my judgment, the demurrer to all four replications should be sustained. The case appears from the pleadings to belong to that large class in which attempts are made to collect the insurance money without the payment of the premiums according to the contract of insurance. It is the duty of officers of insurance companies, who are acting as trustees for others, to resist all such attempts. The assured should comply with his part of the contract, or be excused therefrom by the act or agreement of the insurance company before any just claim can be set up to the insurance money.

There is no ground for a recovery in this case upon the pleadings as they now stand.

MIDDLE DISTRICT OF ALABAMA.

AT CHAMBERS, JANUARY, 1873.

LEHMAN BROTHERS VS. A. STRASSBERGER.

1. Where the issue of bankruptcy *vel non*, is tried by a jury, the errors of the bankrupt court in the progress of the trial must be reviewed by writ of error, and cannot be reviewed by petition.
2. The bankrupt court has power to summon a jury to try the issue of bankruptcy *vel non*, during the vacation of the district court proper.
3. Where A. through a factor makes a contract with B. for the purchase or sale of cotton for future delivery, intending that there should be no delivery, but that the contract should be performed by the payment of differences, but this purpose is not shown to be also the purpose of B.: *Held*, that a note given by A. to the factor for money advanced by him to pay losses on such contracts, and for his commissions in making the same, was a valid and binding obligation.

On the 18th of February, 1873, Lehman Brothers filed in the district court of the United States for the middle district of Alabama, sitting as a court of bankruptcy, their petition in the usual form, and containing the necessary averments, praying that Albert Strassberger might be adjudged a bankrupt.

On the 5th of March, the return day of the order to show cause, Strassberger demanded a jury trial of the issue, whether or not he had committed the acts of bankruptcy charged. On the 12th of April, after the *sine die* adjournment of the district court, the cause was submitted to the court upon the issues of law, and to the jury on the issues of fact raised by the pleadings. During the progress of the trial, exceptions were taken by counsel for petitioning creditors, and at its close a bill of exceptions was signed by the court.

In their petition the petitioning creditors alleged that "the nature of their demand against the defendant was as follows, to

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wit: a commercial paper dated and executed in the city and state of New York, of which the following is a copy:

"New York, September 10, 1872. Four months after date, I promise to pay to the order of Lehman Brothers, ten thousand dollars at the office of Lehman Brothers, 133 Pearl street, New York. Value received. A. STRASSBERGER."

It was charged against the defendant as an act of bankruptcy, "that within six calendar months next preceding the date of the petition, being a trader, he had failed and neglected to pay said note or any part thereof, and still failed and neglected to pay the same, and had suspended and not resumed payment of his commercial paper within a period of fourteen days, in the suspension and nonresumption of the payment of the note above described."

The other acts of bankruptcy charged were a conveyance of real estate to one Proskaur, and to Myer Weiss & Co., creditors, with intent to give them a preference, the defendant at the time of the conveyances being insolvent and contemplating insolvency.

To this petition the defendant filed answer by way of defense, in which he alleged: (1) That he had not committed the acts of bankruptcy charged; and (2), that before the maturity of the note mentioned in the petition, defendant consulted his counsel, learned in the law, touching his liability to pay said note, making a full disclosure of all the facts connected with the giving thereof, and was advised by his counsel that he was not legally liable to pay the same, and for that reason he refused to pay the same at maturity.

The petitioning creditors joined issue on the first defense, and demurred to the second, and moved that it be stricken out as insufficient in law. The court sustained the demurrer, and struck out the second defense.

The main controversy in the case seemed to turn upon the validity of the note from Strassberger to Lehman Brothers, the defendant claiming that the note was void, and, therefore, that the indebtedness, upon which the petition was based, did not exist, and, as a consequence, there could be no adjudication of bankruptcy.

The facts touching the consideration of this note, appeared from the bill of exceptions to be these: Lehman Brothers were

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cotton factors in the city of New York; as such they were many times employed by Strassberger to buy and sell cotton for him, for future delivery; they had so bought and sold cotton for him since 1868. It was the understanding between Strassberger and Lehman Brothers that in all sales or purchases of cotton by them for him, there was to be no delivery but that difference should be paid, except when special instructions were given to receive or deliver cotton. The contracts were made by Lehman & Brothers in the city of New York, and according to the rules of the cotton exchange of that city. By those rules, which were given in evidence, an actual delivery of cotton is provided for and required in every contract unless waived in some mode by the subsequent conduct or assent of both parties, or unless the party having the option to make or require an actual delivery, fails or declines to exercise his option or to insist upon delivery. The consideration of the note upon which the proceeding was based, arose out of the transactions of Strassberger in such cotton contracts, and included losses on the contracts paid by Lehman Brothers for Strassberger, and their commissions for buying and selling. Sometime after the losses were incurred, and had been paid by Lehman & Brothers, Strassberger executed the note, and afterwards promised verbally and by letter to pay the same.

It did not appear that the names of the parties with whom Lehman & Brothers as factors for Strassberger contracted, were disclosed to Strassberger, or that he knew otherwise who they were, or that they agreed there should be no delivery.

On this state of facts it was insisted by counsel for Strassberger that the note in question was void, because it was executed and payable in New York, and was based on cotton contracts made in New York, and because the statute of New York, part 1, ch. 20, title 8, art. 3 (vol. 2, p. 924) declares that: "All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance or casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property or thing in action, so wagered, bet or staked, shall be void."

Upon the question so raised the bankrupt court charged the

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jury: "If you believe from the testimony that it was never intended there should be any actual delivery of the cotton in the future, but the understanding and agreement were that upon the day upon which delivery was to be made, the person agreeing to sell should pay to the person agreeing to purchase, the difference between the price at which the cotton was agreed to be sold and the price current on the day when it was agreed to be delivered, then you will find that the defendant has not committed any act of bankruptcy."

This was the entire charge given to the jury before they retired. In a few minutes they returned into court and propounded the following question: "Suppose the jury believe from the evidence that there was to be a delivery of some of the cotton embraced by said future contracts, then what ought to be the verdict?" Thereupon the court instructed the jury: "That although they might have this belief, yet, unless they believed that the delivery actually made entered into the consideration of the note read in evidence, such belief ought to have no influence on their verdict. That the question submitted to them was whether the note read in evidence was given in consideration of losses or commissions on transactions in futures, in which there was no actual delivery of cotton intended by the parties; that Strassberger had sworn there was no other consideration for the note, and that it was for the jury to say whether they believed this evidence; if the jury believed this evidence, their verdict should be that the defendant had not committed an act of bankruptcy."

The jury returned a verdict for defendant. The case was brought up both by petition of review and by writ of error.

Messrs. Samuel F. Rice and David Clopton for Lehman Brothers.

Messrs. John A. Elmore, H. A. Herbert and D. S. Troy, for defendant.

Woods, Circuit Judge. The first question presented for decision is, Which method of bringing the case to this court for review is the proper one, by petition under the second section of the bankrupt act, or by writ of error?

In *Morgan v. Thornhill*, 11 Wall., 75, Mr. Justice CLIFFORD

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remarks: "Whether a writ of error will lie from the circuit to the district court, when the debtor opposes the petition that he may be adjudged a bankrupt, and the question whether he has committed an act of bankruptcy is tried by a jury, is not a question involved in the case before the court, suffice it to say at this time that such cases when tried by a jury, if the circuit court has any jurisdiction upon the subject, must be removed into the circuit court by writ of error."

Where the question, whether the defendant has committed an act of bankruptcy, has been tried by a jury, the approved practice seems to be to carry the case to the circuit court on writ of error, and not in petition of review. This was done in the case of *Phelps v. Clasen*, 3 B. R., 87, tried by Mr. Justice MILLER, of the supreme court, in the circuit court for the district of Minnesota.

Section 8 of the bankrupt act provides, that "writs of error may be allowed to the circuit courts from the district courts, in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars." This must be construed in connection with that clause in the seventh amendment to the constitution of the United States, which declares, "that no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law."

The common law here alluded to is not the common law of any individual state, but the common law of England, according to which facts once tried by a jury are never reëxamined unless a new trial be granted in the discretion of the court before which the suit is depending, for good cause shown, or unless the judgment of such court be reversed by a superior tribunal on a writ of error, and a *venire facias de novo* awarded. *United States v. Wonson*, 1 Gall., 20.

We must give the clause of the bankrupt act now under consideration such construction as will bring it into harmony with this clause in the constitution.

The fact of bankruptcy when tried by a jury can only be reëxamined on motion for new trial or upon writ of error. A petition of review to reëxamine a fact tried by a jury is a pro-

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ceeding unknown to the common law. The fact that the issue is tried by a jury, makes it a case at law; and when the value of the bankrupt's estate exceeds five hundred dollars, the debt or damages claimed may be said to exceed that amount. We must give this construction to section 8, or else hold that when the issue of bankruptcy is tried by a jury the case cannot be reëxamined in the circuit court at all. It seems clear that the intention of the bankrupt act was to allow all cases in equity and at law, and all cases and questions of every kind arising under the act, to be reëxamined in the circuit court. This is provided for in sections 2 and 8. I think that it was the purpose of the act that the issue of bankruptcy, when tried by a jury, should be reëxamined in the circuit court, and that this reëxamination should be upon writ of error. When a jury has not intervened, the case may be taken up on petition.

I shall therefore proceed to consider the case as here upon writ of error.

A motion is made to dismiss the writ on these grounds:

1. Because no writ of error will lie to remove the judgment of the bankrupt court for error intervening in the proceedings by which the party is adjudged a bankrupt; and,

2. Because the question of bankruptcy *vel non*, having been tried during the vacation of the district court proper, the remedy of the plaintiffs in error is by revisory petition under the second section of the bankrupt act, and not by writ of error, and this, notwithstanding the issue, was tried by a jury.

The first ground of the motion to dismiss the writ has been settled adversely by the supreme court of the United States in *The Insurance Co. v. Comstock*, 16 Wall., 258, and therefore does not demand further notice.

In support of the second ground it is insisted that no jury trial could be properly had during the vacation of the district court, and therefore the proceeding by petition, and not by writ of error, is the proper one. To sustain this view, we are cited to a clause in the 41st section of the bankrupt act (14 Stat., 537; Rev. Stat., sec. 5020), which provides that the court "shall, if the debtor, on the same day," to wit, on the return day or adjourned day, "so demand in writing, order a trial by jury at the first

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term of the court at which a jury shall be in attendance to ascertain the facts of such alleged bankruptcy." It is insisted that this section only authorizes a jury trial at a term of the district court, and not at a bankrupt court held during the vacation of the district court; that the trial by jury in this case was unauthorized, and that therefore the case should be brought to this court precisely as if no jury trial had taken place, to-wit, by petition and not by writ of error. Conceding, for the sake of argument, that the construction given to the clause of the statute is the correct one, we do not think the inferences drawn by counsel for defendant follow.

When a petition is filed to place a party in involuntary bankruptcy, the alleged bankrupt may take issue upon the acts of bankruptcy charged, and have the issue tried either by the court or a jury, at his option. If he chooses the former, he does so with the distinct knowledge that any error committed by the court must be corrected by petition to the circuit court. If he demands a trial by jury, he is entitled not only to such trial, but both parties are entitled to all the incidents which necessarily follow such trial, according to the course of the common law. One of these is the constitutional right to have the facts found by the jury reexamined by the appellate court upon writ of error, and in no other way. In this case, the alleged bankrupt demanded a trial by jury. It is clear that the fact that the court erred as to the time when the trial should take place, and as to the jury by which the issue should be tried, does not deprive either party of the right to a writ of error. The court had jurisdiction of the subject matter and of the parties, although it may not have had authority to summon a jury at that time, still that does not make its proceedings void, but only voidable as for error. The fact stands that there has been a jury trial, and that the judgment of the court is based upon the finding of a jury. To hold that because the court erred in calling a jury in vacation and not in term time, the writ of error must be denied, is to deprive the parties without their consent of a right secured by the constitution of the United States.

The record does not show that the petitioning creditors demanded that the jury trial should take place when it did. The

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defendant had demanded his trial by jury. So far as appears from the record, neither party objected to the jury on the ground that the court had no authority to impanel it in vacation of the district court. If there has been a waiver by this action of any right, it is not the right to a writ of error, but the right of either party at this day to raise any question touching the legality of the jury.

But I think a fair construction of the first and forty-first sections of the bankrupt act shows that the bankrupt court may impanel a jury to try the issue of bankruptcy *vel non*, during a vacation of the district court.

The first section declares "that the several district courts of the United States be and they are hereby constituted courts of bankruptcy. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court." The evident meaning is that the power of the bankrupt court may be exercised as well in vacation as in term time of the district court proper.

Among the powers and jurisdiction of the bankrupt court, is the power to try an issue of bankruptcy *vel non*, by a jury. The power, by the express words of the act, may be exercised in vacation, unless it is taken away by the expression used in the forty-first section of the act already quoted, that "the judge shall order a trial by jury at the first term of the court at which a jury shall be in attendance." Does this mean the first term of the district court proper? We think not.

1. Because the policy of the bankrupt act is to provide for a speedy and summary settlement of the bankruptcy. If a jury trial is demanded, and no jury can be summoned until the regular term of the district court, the question of bankruptcy may be suspended for a period of five or six months. The fact that the adjudication relates back to the filing of the petition shows that no such delay was contemplated.

2. A construction so opposed to the spirit and purposes of the

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law should be avoided if possible. The phrase, "at the first term of the court at which the jury should be in attendance," may, without violence to the language of the bankrupt act, be referred to a time when the district judge is holding a session of the bankrupt court, as distinguished from his sittings in chambers. Or, it may be referred to the clause of section one, namely, "Said courts may sit for the transaction of business in bankruptcy at any place in the district, of which place, and the time of holding the court, there shall have given notice, as well as at the place designated by law for holding said courts." The construction, that no jury trial can take place except during a term of the district court, does violence to the first section of the bankrupt act, and limits the powers of the bankrupt court in vacation, when that section declares they shall be the same as in term time.

For these reasons, I am of opinion that the bankrupt court may, in its discretion, summon a jury during the vacation of the district court. In every point of view, therefore, the second ground for dismissing the writ of error is not well taken.

In my judgment, therefore, the case is here properly upon writ of error, and must be so considered.

The assignments of error, by the petitioning creditors, relate mainly to the charge of the court touching the validity of the note made by Strassberger to Lehman Brothers. It is claimed by petitioning creditors, that the charge is erroneous, and the question is thus presented, whether, under the facts already cited, the note in question was a binding obligation upon Strassberger.

Let it be conceded, that contracts for the future delivery of cotton, when it is agreed there shall be no delivery, but that differences shall be paid, are wagering contracts, and void as between the parties. That is not the case shown by the record here. The parties here are not parties to any contract for the sale or delivery of cotton. Lehman Brothers, as far as appears from the record, never at any time sold to or bought from Strassberger a pound of cotton. The parties with whom Strassberger contracted were persons other than Lehman Brothers, whose names are not disclosed. Lehman Brothers were only factors of Strassberger to make contracts with other parties. When, therefore, they

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sue Strassberger to recover money paid by them for him, on such contracts, and their compensation for their services, the court is not called upon to enforce a contract against the law between the parties to that contract, but simply to enforce the collection of a note, the consideration of which is money advanced and services performed by agents for their principal.

If Strassberger was suing the parties with whom he contracted, either to buy or sell cotton for the difference between the contract and the market price, then the case would approach more nearly to what is forbidden by the New York statute.

This is the case, to put it in its strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case, the contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract. *Durant v. Burt*, 98 Mass., 167; *Petrie v. Hannay*, 3 Term, 418; *Owen v. Davis*, 1 Bailey, 315; *Armstrong v. Toler*, 11 Wheat., 274.

It has even been held, that partners who have been engaged in illegal transactions shall be held to account to each other for profits of such transactions. *Brooks v. Martin*, 2 Wall., 78.

The fact, that the agent includes in a note given for money paid by him for losses in an illegal transaction, compensation as for his services, does not taint the note. Such commissions would not avoid the note unless given for services as agent in a transaction which is not merely *malum prohibitum* but *malum in se*.

We must look at the contract for future cotton, as originally made, to determine its legality or illegality. Strassberger testifies, and in this he is uncontradicted, that it was the understanding between him and Lehman Brothers, that in all sales or purchases of cotton by them for him for future delivery, no cotton should be actually received or delivered, but only the differences paid, except when special instructions were given to receive or deliver cotton; and the record shows that he did, on more than one occasion, elect to deliver cotton. If he reserved the option to receive or deliver, the contract was legal in all respects, even

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though he might have had a purpose in his own mind not to receive or deliver, and had communicated that purpose to his agents. The question is, Did he communicate that purpose to the parties not named, with whom he contracted? There is no evidence that he did. On the face of his contract, he binds himself to deliver cotton, and the other party binds himself to receive it. Now what effect can the mental purpose of Strassberger to pay or to demand differences instead of delivering the cotton have upon the contract, when that purpose is unknown to the other contracting party? Here is no bet or wager. "It cannot be a wager unless both parties are cognizant of the facts." *Hibblewhite v. McMorine*, 5 Mees. & Wels., 462.

I think, therefore, that the charge of the learned judge, now under consideration, was erroneous.

As error appears in the record which may have been to the prejudice of the petitioning creditors, it follows that the judgment of the district court must be reversed, and the cause remanded to that court with directions to award a *venire facias de novo*.

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1. Where a judgment was a lien on the real estate of the judgment debtor, and an execution had been levied thereon, and the property advertised for sale, but before sale the judgment debtor was adjudicated a bankrupt, the sheriff, unless restrained by the bankrupt court, might well proceed to sell, and his sale would be valid.
2. The naked fact, that the judgment debtor had been adjudicated a bankrupt before the sale, did not of itself operate as an injunction to restrain the sale.
3. When, however, real estate was first seized in execution by the sheriff, long after the bankruptcy, and sold for little more than one-tenth its value, the sale was set aside, and the property turned over to the assignee.
4. When several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property, and under this agreement it is bid off for its full value, the sale will not be set aside on account of such agreement.

REVIEW IN BANKRUPTCY.

Mr. E. W. Pettus, for petitioners.

Messrs. John T. Morgan and W. L. Bragg, for defendants.

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Woods, Circuit Judge. This is a petition filed under the second section of the bankrupt act, seeking a review and reversal of an order of the district court for the middle district of Alabama, sitting in bankruptcy.

From the pleadings and evidence I find the following facts: On the 12th of November, 1866, one Samuel McKirral recovered a judgment against Edward A. Blunt, in Perry county circuit court, for \$2,227 and costs. On the same day, in the same court, M. Morgan & Sons recovered a judgment against the same Edward A. Blunt for \$3,201.23 and costs. Soon after the rendition of these judgments, executions were issued upon them, and thereafter, from time to time, executions were issued on the judgments according to law, so as to preserve their lien on the property of the defendant in execution within the county of Perry. On the 28th of November, 1868, pluries executions were issued on these judgments, and on that day placed in the hands of the sheriff of Perry county, who, on the same day, levied the same upon certain real estate, the property of the judgment debtor, situate in and near the town of Marion, in the county of Perry.

On the 8th of November, 1867, C. E. Thames & Co., who are among the petitioners in this case, also recovered a judgment in Perry circuit court against Blunt for \$7,651.66, on which judgment an execution was issued on the 16th day of December, 1867, and levied on certain real estate of the defendant in execution, situate in Perry county, and returned by the sheriff without further proceedings; and afterwards other executions were, from time to time, issued and returned by the sheriff, so that at the time of the sale, hereinafter mentioned, the said execution was a lien on said real estate.

On the 7th and 8th of November, 1867, other parties, some of whom are petitioners in this case, and other defendants, also recovered judgments in the same court against Blunt, on which executions were, from time to time, so issued and returned, that at and before the date of sale, hereafter mentioned, the judgments were a lien upon the lands and personal property of Blunt within the county of Perry.

Immediately after the 28th of November, 1868, the date when the sheriff of Perry county levied the executions of McKirral and

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Morgan & Sons, and before the 9th day of December, 1868, the sheriff advertised for sale the property so levied on to satisfy said executions, the sale to take place on the 4th of January, 1869.

Before the day of sale, to wit, on the 2d of January, 1869, certain judgment creditors of Blunt, to wit, Francis A. Bates, who had become the assignee and owner of the judgments of McKirral and Morgan & Sons, C. E. Thames & Co., Mary J. Williams, Martha Benson, Duryee & Jaquess, John Barron, Cyrus Billingsly, Thomas S. Wallace and Oscar Cheeseman, all of whose judgments were claimed to be liens on the real estate of Blunt, in Perry county, entered into a contract in writing, which recited that the real estate of Blunt had been levied on to satisfy sundry executions in favor of said creditors, and that without concert of action the property might be sacrificed, and the creditors realize but little on their debts. In order, therefore, to prevent a sacrifice, and to collect as much as possible on their debts, they mutually agreed to buy the real estate so levied on, on the 4th of January, 1869, and to hold the same until such time as they, or a majority of them, might think best to sell the same, and carry the proceeds into the circuit court of the county of Perry, there to be distributed under the order and direction of the court, according to the respective priorities of the parties, and without prejudice to the rights of any one.

On the 4th of January, 1869, the sheriff struck off the real estate advertised to be sold under the executions of McKirral and Morgan & Sons, in parcels, to several of the parties who signed this agreement, and among the purchasers were the petitioners in this proceeding. The aggregate amount for which the several parcels were sold was \$19,685 in cash, which sum was paid by the purchasers to the sheriff, who, after deducting the costs, applied the net proceeds of the sale to the judgment liens in the order of their priority, crediting the same upon the executions, whereby the money so paid, less the costs, immediately found its way back to the hands of the parties from whom it had been received. The sum for which the property sold was, according to the weight of the testimony, as much as it would at that time reasonably bring in cash, and more than it would sell for now. The judgments to which the proceeds were applied

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were, with the exception of a mortgage lien, the first and best liens upon the property sold, and it was sold subject to the mortgage. The liens upon the property far exceeded what the property was worth.

In the meantime, after the levy by the sheriff and his advertisement of sale, and before the sale, to wit, on the 9th of December, 1868, Blunt, the defendant in execution, filed his petition in the district court for the middle district of Alabama, to be adjudged a bankrupt. He was adjudicated a bankrupt on the 14th of December, 1868, and on March 27, 1869, William Miller was appointed his assignee in bankruptcy, and the 16th of March, 1871, said Bailey was appointed associate assignee of said Miller. On the 18th of March, 1871, the assignees filed their petition in the bankrupt court, praying that said sheriff's sale be set aside; that the purchasers be required to account for the rents of the property; and for an order of the bankrupt court authorizing them to sell the property free of incumbrance. A full answer to this petition was filed by the defendants on May 23, 1871, and the bankrupt court referred the case to the register in bankruptcy, to take testimony and report his opinion upon the facts. Upon the coming in of the register's report, the court made an order in conformity with the prayer of the petition. To review and reverse this order is the object of this petition of review.

In passing upon the case, I shall only notice two of the questions presented, namely: 1. Had the sheriff of Perry county a right, under the facts as above detailed, to sell the property in question, and would his sale and deed, in the absence of fraud, make a good title? and, 2. Was the arrangement between the creditors to buy at the sheriff's sale a fraudulent one? Other questions have been argued by counsel, but they have been so often passed upon by the court, as stated during the argument, that I shall not consume time by noticing them further.

The first question to be passed upon must, in my opinion, be answered in the affirmative. The judgments upon which the property was sold had for years been liens upon the property, the sheriff had levied his executions upon it, and had advertised it for sale before the filing of the petition in bankruptcy. Now,

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unless the naked fact of the filing of the petition by Blunt, to be adjudicated a bankrupt, operates as an injunction on the sheriff, restraining him from further proceedings under the execution, and rendering such proceedings void, then the sale by the sheriff is a good one. I do not think such is the effect of the filing of the bankrupt's petition. *Goddard v. Weaver*, 1 Woods, 257.

It has been held that the bankrupt court has the right by injunction to restrain a sale by a sheriff or other officer of the law, of property surrendered by the bankrupt. *Irving v. Hughes*, 2 B. R., 62; *Jones v. Leach*, 1 id., 595; *Pennington v. Sala*, id., 572; *Pennington v. Lowenstein*, id.; *In re Bowie* id., 628; *In re Schnepf*, B. R. Sup., 41. But it by no means follows from this proposition that if the bankrupt court does not intervene, and the sheriff proceeds without the interference of that court, his proceedings are void, and the purchaser takes no title. The contrary has been expressly held. Thus, *In re Fuller*, 4 B. R., 116, the court says: "The judgment against the bankrupt having by lapse of time become valid, so far as the bankrupt act is concerned, Smith has acquired a lien thereby upon the real estate in question. Upon the application of parties interested, this court has jurisdiction to ascertain and liquidate this lien (Bank Act, sec. 1), and while doing so, to enjoin Smith from enforcing the same by execution out of the state court. But after the process of the state court has been executed and the property sold thereon, it is too late for this court to interfere. The purchaser at such sale acquires a good title; and this is so even if the judgment was fraudulent, provided the purchaser was an innocent one. For this reason, as well as upon general principles, this court could not set aside the sale upon the process of the state court, and order the property resold, however apparent it may be that it was sold much below its real value."

So *In re Bernstein*, Sup. B. R., 43, which in its facts very much resembled the case on trial, it was held, that where the property of the bankrupt has been sold by the sheriff under an execution issued on a valid judgment in a state court, an injunction will not be granted. The court says: "In this case the property has been sold, and the proceeds of it are in the hands of the sheriff. No advantage can result from requiring the

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money to be paid into this court with a view to its application by this court in satisfaction of the lien on the property. An order will be entered allowing the sheriff to apply the proceeds of the sale of the property towards the discharge of the amount which he is required by the execution to make, including his charges and fees therein, and directing him to pay the overplus, if any, to the assignee, if there be one; and if there be none, then to the clerk of this court."

In this case I decide this, that where an execution is issued on a valid judgment of a state court, and levied by the sheriff upon the property of the judgment debtor, who, intermediate the levy and sale, is adjudged a bankrupt, and the sheriff proceeds to sell the property without restraint from the bankrupt court, and the sale is made for a fair price without fraud, and the proceeds applied to the payment of liens thereon, in the order of their priority, the sale is not void, but valid, and the bankrupt court ought not to set aside the sale and direct the property to be re-sold. In my opinion, therefore, the sale made by the sheriff of Perry county, on the 4th of January, 1869, ought to stand, unless the agreement between themselves, under which the purchasers bought, was fraudulent.

The purpose expressed in this agreement was a proper one, namely, to prevent a sacrifice of the property, and to make it pay as much as possible on the liens. Its object and effect were not to suppress bidding; but, on the contrary, by the union of the means of several persons, bidding was promoted. There was nothing illegal in this arrangement. *Phippen v. Stickney*, 3 Met., 387, 388; *Kearney v. Taylor*, 15 How., 494; *Smull v. Jones*, 1 Watts & Sergt., 128; 1 Sugden on Vendors, 17, and notes; Chitty on Contracts, 407, note m. I have been unable to find anything in the said agreement of the purchasers, or in their conduct in reference to the sale, that is fraudulent. The sale appears to have been fairly conducted and the property to have brought all that it was reasonably worth.

It seems, from an amendment to the petition of the assignees in the bankrupt court, that after the sale made by the sheriff, on the 4th of January, 1869, to wit: on the 1st day of August, 1870, two parcels of land, containing together twenty-five acres, were sold

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by the sheriff in Perry county, on an execution on a judgment of Mary Jane Williams against Blunt, issued and levied upon the 17th day of June, 1870. As this property was seized in execution long after the bankruptcy, and appears to have been sold for little more than one-tenth of its value, I think the sale should be set aside.

A period of six months elapsed between the rendition of the decree in the bankrupt court and the filing of the petition in this court to reverse the same. This delay, unless accounted for, I should consider unreasonable, and should have dismissed the petition as coming too late, had there not been peculiar circumstances in the case, as stated by counsel, which satisfactorily account for the delay. In the meantime, however, the assignees, proceeding to carry out the decree of the bankrupt court, have incurred costs in advertising the sale ordered by that decree. As these costs are the result of the delay of the petitioners, I think the petitioners should pay them, and not the assignees.

A decree will be entered reversing so much of the decree made by the district court sitting in bankruptcy on June 14, 1872, as sets aside the sale made by the sheriff of Perry county on the 4th day of January, 1869, and as directs the said assignees in bankruptcy to resell said real estate, and as directs the defendants in the petition in the bankrupt court to pay to the said assignees the rents since January 4, 1869, for the real estate purchased by them on that day, and as directs the delivery up of possession to said assignees of the real estate so sold on January 4, 1869, and directing all tenants in possession thereof to attorn to said assignees, and as decrees the costs made in said proceedings against the defendants.

The decree will also be against the said assignees for the costs of this case in the district court and in this court, but the petitioners in review will be required to pay the costs incurred by said assignees in advertising the sale of said property, to take place on January 4, 1869.

So much of the decree of the district court as sets aside the sheriff's sale of the property, made on August 1, 1870, and directs said assignees to resell the same, is affirmed.

The injunction heretofore allowed, restraining said assignees

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from making sale of said real estate sold by the said sheriff on January 4, 1869, and August 1, 1870, or from making any report of sale, or in any manner executing said decree rendered on June 14, 1872, will be continued and made perpetual, except so far as the same relates to and embraces the property sold by said sheriff on August 1, 1870, and, as to that, said injunction is dissolved.

NOVEMBER TERM, 1874.

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The removal of an assignee in bankruptcy by the district court, for a "cause which in its judgment renders such removal necessary or expedient," is not such a case or question as can be reviewed by the circuit court.

PETITION OF REVIEW under sec. 2, bankrupt act.

Lehman Durr & Co. and other creditors of the bankrupt estate of Isaac Adler & Brothers, on the 17th of August, 1874, filed their petition in the district court, praying for the removal of P. H. Pitts and C. C. Carr, assignees of the bankrupt estate. The grounds upon which the removal was asked were that the assignees were squandering, mismanaging and illegally disposing of the assets of the bankrupts.

The assignees answered, denying generally and specifically the averments of the petition, and the matter was referred to Joseph W. Burke, Esq., register, to take testimony and report his opinion upon the law and facts.

On the 2d of September, 1874, Mr. Burke made his report, in which he found that the specific charges alleging particular acts of maladministration, collusion and fraud, were not sustained by the weight of evidence. He reported, however, that the assignees had disposed of and sold at private sale for \$10,850, a large stock of goods valued at \$22,000, without an order of court, and that no account was kept of the articles sold, the purchasers of the same, or of the amount for which such articles

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were sold. He also reported that the real property belonging to the bankrupt estate was subject to two mortgages, the amount due on which was about equal to the value of the property, and that the assignees, without any authority from the court, surrendered this real estate to the junior mortgagee, on condition that she would pay off the senior mortgage, and release all claim to the remainder that might be due on her mortgage after exhausting the security.

These findings of the register seemed to be abundantly supported by the evidence. In fact, they were not disputed.

It appeared from the evidence, very clearly, that in selling the stock of goods at private sale without an order of court, the assignees acted under the advice of their counsel; but the evidence does not clearly show that they were advised by their counsel not to keep an account of the articles sold, the persons to whom they were sold, and the amount received for each article. Nor did it appear that the transfer of the real estate to the second mortgagee was made by advice of counsel.

Upon the coming in of the report of Mr. Burke, the court, upon consideration of the evidence, the report of the register and arguments of counsel, ordered that the assignees be removed.

To review and reverse this action of the district court was the purpose of the petition of review.

Mr. H. A. Herbert, for petitioners.

Messrs. S. F. Rice and J. Q. Smith, for defendants.

Woods, Circuit Judge. It is insisted by counsel for defendants that this court has no jurisdiction of the question presented, and this point necessarily first demands attention.

Section 14 of the bankrupt act (Rev. Stat., sec. 5039) provides "that the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient." It further provides that "at a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with the consent of the court, remove any

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assignee by such a vote as is herein provided for the choice of assignees."

This section places the removal of an assignee entirely within the discretion of the district court, either acting alone or in connection with a meeting of the creditors.

Can it be reasonably claimed that the action of the court in removing an assignee, or in consenting to a removal by a vote of the creditors is such a case or question as may be reviewed by virtue of the provisions of the second section of the act?

The court may remove "for any cause which, in its judgment, renders such removal necessary or expedient." It is the judgment of the district court touching the necessity or expediency of the removal that decides the question of removal, not the judgment of the circuit court. The only question is this: Was the removal necessary or expedient in the judgment of the district court? This is settled conclusively by the record and is not open to dispute or review. If this court could review the decision of the district court removing an assignee, it could also review the discretion of the district court in calling a meeting of creditors to pass upon the question of removal, and could review the consent of the district court to a removal made by a meeting of the creditors.

The discretion lodged with the district court to remove an assignee is just as broad as the discretion to appoint an assignee under certain circumstances.

The 13th section of the bankrupt act (Rev. Stat., sec. 5034) declares: "If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees." So that if the creditors fail to elect, and there is an opposing interest, the judge is authorized to appoint assignees. This power to appoint under the 13th section is no more clearly confided to the discretion of the judge than the power to remove under the 18th section. Can it be claimed for a moment that the appointment of assignees by the judge, made by virtue of the 13th section, could be reviewed by the circuit court. Suppose a creditor, or all the creditors, should think that the assignee appointed by the judge was an improper one, would the circuit court review the appointment? Clearly not, because the

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power and responsibility of the appointment is lodged under the circumstances where the district court has power to appoint at all, with the district court and not with the circuit court or with the creditors. If the circuit court cannot review an appointment of an assignee made by the district court, neither can it review the removal of an assignee made by the same court. For both the power of appointment in the contingency mentioned and the power of removal is lodged in the discretion of that court.

These views are sustained by the decision of Mr. Justice Miller in the case of *Woods v. Buckwell*, 7 Bankr. Reg., 406.

I am of opinion, therefore, that the question presented by the petition of review is not a question which this court has the power to review; that in the appointment and removal of assignees, the discretion is lodged with the district court, and that discretion cannot be questioned by the circuit court or the judges thereof. It follows that the petition of review must be dismissed.

GILEAD A. SMITH VS. TALLAPOOSA COUNTY.

1. Where a coupon is payable at a particular place, presentation for payment at that place is not a condition precedent to a recovery of judgment thereon by suit.
2. Authority given by a public act of the general assembly to a county to subscribe stock to a railroad company and issue bonds to pay for the same, need not be pleaded. The courts of the United States will take judicial notice of the public acts of the states within which they sit.
3. When a county issues bonds payable to bearer, and pledges for their payment the faith, credit and property of the county under authority of an act of the legislature referred to on the face of the bonds by title and date, and these bonds pass *bona fide* into the hands of the holders for value, the county is bound to pay them.
4. A county, under authority of an act of the legislature, issued its bonds, payable to bearer at a future day, and after their issue, and long before their maturity, the supreme court of the state declared the law authorizing the issue to be constitutional. *Held*, that all persons to whose hands the bonds might come might consider that question as conclusively settled; it could not be reopened to their damage.

Heard on demurrer to declaration.

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Mr. Samuel F. Rice, for plaintiff.

Mr. Thomas H. Watts, for defendant.

Woods, Circuit Judge. The action is brought to recover three thousand dollars, the amount due upon 222 coupons, of which the plaintiffs aver themselves to be the holders, which were attached to that number of bonds issued by the defendant county.

A copy of one of the bonds is set out in full in the declaration, and it is averred that the others are similar, save in number and amount. The bonds purport on their face to be issued by the defendant in pursuance of authority granted by an act of the Alabama legislature, approved December 31, 1868, entitled "an act to authorize the several counties, towns and cities of Alabama to subscribe to the capital stock of such railroads throughout the state, as they may consider most conducive to their interests."

A copy of one of the coupons is set out in the declaration, and the others are averred to be similar save in amount and date of payment. The coupons are made payable at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery. It is averred that the plaintiffs are *bona fide* holders of the coupons, and of the bonds to which they were attached, and that the bonds and coupons were purchased by the plaintiffs for a valuable consideration, before the bonds or coupons on any of them fell due; that when the coupons sued on became due the defendant had no funds at the agency of the Savannah & Memphis Railroad Company in the city of Montgomery to pay the same, and that in fact at that time the railroad company had no agency in the city of Montgomery, and did not have, up to the time of bringing the suit.

The demurrer is based on three grounds:

1. That there is no averment that the coupons were presented for payment before suit brought.
2. There is no averment of the authority of the county to issue the bonds.
3. Because the act of the general assembly authorizing the issue of the bonds is contrary to the provisions of the state constitution.

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On the first ground of demurrer it is sufficient to say, that it is now the well settled doctrine of the courts of this country, that when a note is payable at a particular place, presentation for payment at that place is not a condition precedent to a suit against the maker. *Wallace v. McConnell*, 13 Pet., 148; *Irvine v. Withers*, 1 Stew., 234; *Montgomery v. Elliott*, 6 Ala., 701.

This is the settled law, even where there is no excuse for the nonpresentation of the note. But the declaration avers a fact, which abundantly excuses the want of presentation, even if presentation were necessary, namely: that the Savannah & Memphis Railroad Company had no agency in the city of Montgomery, where, according to the tenor of the bonds, the coupons were to be presented for payment. The law does not require any one to do a vain or impossible thing.

The next objection to the declaration is that the authority of the county of Tallapoosa to issue the bonds is not averred.

The authority of the county to issue bonds was conferred by a general and public act of the legislature of the state. An authority given by a general statute need not be pleaded. *Tappen v. The Railroad Company*, 4 West. Law Mo., 67. The courts of the United States take judicial notice of the public acts of the states.

And what the court judicially knows need not be averred or proven.

It did not therefore require a special averment that the county of Tallapoosa was authorized to issue the bonds. The court judicially knows that on certain conditions, the county of Tallapoosa, and every other county in the state of Alabama, was authorized to issue bonds in aid of the construction of railroads. The declaration avers that certain bonds were issued, which show upon their face that they were issued in pursuance of the authority conferred by a certain act of the legislature. We think that the facts of which the court takes judicial notice, taken in connection with the facts averred, sufficiently show the authority of the defendant county to issue the bonds in suit.

Where a county issues its bonds payable to bearer, and pledges for their payment the faith, credit and property of the county, under the authority of an act of assembly referred to on

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the face of the bonds by date, and those bonds pass *bona fide* into the hands of holders for value, the county is bound to pay them. *Mercer County v. Hackett*, 1 Wall., 83; *Gelpcke v. Dubuque*, id., 175; *Meyer v. Muscatine*, id., 384; *Van Hostrop v. Madison City*, id., 291.

It seems clear that the averments of the declaration bring the case within the rule thus laid down, and make, so far as the objection under consideration goes, a *prima facie* case for recovery. I am of opinion, therefore, that the second ground of demurrer is not well taken.

But it is assigned lastly, as an objection to the declaration, that the act of the general assembly authorizing the issue of bonds by counties is unconstitutional.

It is settled by authority, if indeed it requires authority to settle so plain a proposition, that a county or other municipal corporation has no inherent right of legislation, and cannot subscribe for stock in a railroad and issue bonds to pay for it, unless authorized to do so by the legislature. *Thompson v. Lee County*, 3 Wall., 327.

But the legislature of a state, unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan. *Thompson v. Lee County*, *supra*.

The question is therefore presented, Does the constitution of Alabama prohibit the general assembly from authorizing cities and counties to subscribe stock in railroads, and to borrow money and issue bonds to pay for it?

This question has been decided by the supreme court of Alabama, in *Ex parte Selma & Gulf Railroad Company*, 45 Ala., 696. The court in that case has passed upon the constitutionality of the identical act, under authority of which the defendant county issued the bonds in this case, and sustained its constitutionality. And it is stated at the bar that this decision has been approved by a later one of the same court. *Lockhart v. The City of Troy*, not yet reported.

The bonds of the county of Tallapoosa, issued under authority of the act referred to, are protected by the decision, even though

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issued before it was made. These bonds are payable to bearer, and circulate by delivery as negotiable paper. They are the property of one holder to-day, and of another to-morrow. As soon then as a decision of the highest court of the state is made, affirming the constitutionality of the act under which the bonds were issued, all persons to whose hands the bonds may come are authorized to consider that question as conclusively settled. It cannot be opened to their damage. Even should the decision be reversed, the reversal cannot affect bonds already issued. *Gelpcke v. Dubuque*, 1 Wall., 175.

I have read with interest the argument submitted to prove the unconstitutionality of the act of the legislature under which the defendant county issued its bonds. But even if I were disposed to agree with its conclusions, it could not avail in this case.

For the purposes of this suit, and so far as these bonds are concerned, the act under which they are issued must be considered as constitutional and valid, and the question of the power of the county to issue them foreclosed.

Demurrer overruled.

AT CHAMBERS, JANUARY, 1875.

JOHN F. BAILEY, Assignee, vs. LOEB & BROTHER.

1. The bankrupts became the lessees of premises for one year, and were adjudicated bankrupt within two months after the beginning of the term: *Held*, that rent, which accrued after the adjudication, could not be proved or allowed as a debt against the bankrupt estate.
2. Where the law of the state gave the landlord a lien upon the goods and chattels on the demised premises to secure the rent for one year, and the lessees were adjudged bankrupt before the end of the year: *Held*, that the landlord had no lien on the goods and chattels, for rent which accrued after the bankruptcy and after the premises were surrendered.
3. The law of Alabama (Rev. Code, sec. 2878) does not give the landlord a lien for rent upon goods and chattels of a tenant found upon the premises, held by lease for one or more years; but as between an execution creditor and the landlord, simply declares that the latter shall be entitled to priority of payment out of the proceeds of the goods, to the extent of one year's rent.

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This cause was a petition to review the action of the district court, sitting as a court of bankruptcy. The conceded facts were as follows:

The defendants, Loeb & Brother, were the owners of a store room in the city of Montgomery. They leased the same to the bankrupts, Shulman, Frankferter & Co., for the term of one year, commencing on the first day of October, 1873, for a yearly rent of \$1,800, payable in monthly installments of \$150. A petition in involuntary bankruptcy was filed against the lessees on the 25th of November, 1873, and they were soon after adjudged bankrupts. At the date of the adjudication, they were the owners of a stock of goods which was upon the demised premises. The goods were seized by order of the bankrupt court, and remained on the premises until they were sold out by the assignee, who received the proceeds of the sale, which were more than enough to pay the rent for the entire year. The bankrupts did not occupy the store after they were adjudicated bankrupts; but it was occupied by the assignee from that date up to the 28th of January, 1874. After the last mentioned date, the assignee did not occupy the premises, nor did he let them to any other person. The rent of the store room was paid in full up to the time of the bankruptcy, and the assignee paid, as a part of the expenses of administration, the rent from the date of the bankruptcy up to the 28th of January, 1874. On that day he gave up the possession of the premises to the landlords, it being stipulated that they would not hold the assignee individually liable, upon any claim for rent, and the assignee agreeing that the acceptance of the premises by the landlords should not affect any rights or liens against the bankrupts' estate, which the landlords might have for the payment of rent to accrue after January 28th.

Loeb & Brother claimed to have a lien upon the goods which were upon the premises at the time of the bankruptcy, for the eight months and three days' rent, from January 28th to October 1, 1874. They applied to the district court to order the assignee to pay out of the proceeds of the goods the said rent, amounting to \$1,200. That court directed the assignee to pay them \$600, and required the lessors to give up any further claim. The assignee, claiming to be aggrieved by the action of the district

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court, filed this petition and asked that the order of the district court might be reviewed and reversed.

The defendants, Loeb & Brother, claimed that the rent which fell due after the 28th of January, 1874, was a debt provable against the bankrupt estate, and that under the laws of Alabama, they had a lien for its payment upon the stock of goods which were stored upon the leased premises at the date of the bankruptcy, and that they were entitled to priority of payment out of the proceeds of the goods, for the rent up to October 15, 1874.

Messrs. M. D. Graham and H. A. Herbert, for petitioner.

Mr. David Clopton, contra.

Woods, Circuit Judge. The first question for decision is, Can rent, to accrue in future, after an adjudication in bankruptcy, be proven and allowed as a debt against the bankrupts' estate?

The 19th section of the bankrupt act (Rev. Stat., secs. 5067, 5068, 5069, 5070, 5071, 5072) describes what debts may be proven, and it declares that no other debts than those specified in this section shall be proven or allowed against the estate. The case of rent falling due in the future, at fixed and stated periods, is specially provided for as follows: "When the bankrupt is liable to pay rent or other debt, falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." The meaning of this clause admits of no doubt. In the case of rent falling due at fixed and stated periods, the creditor may prove his claim for so much rent as had accrued at the date of bankruptcy.

For instance, if the rent is \$1,200 per annum, payable in quarterly installments of \$300, and at the close of the second month of a quarter the lessee is adjudged bankrupt, although there may be no rent yet due, nevertheless the landlord may prove his claim for \$200, the rent accrued at the time of bankruptcy. But the last clause of the 19th section says, he shall prove for nothing more. So a proportionate part of debts, other than rent falling due at fixed and stated periods, may be proven in the same way. For instance, a business man has a manager

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or bookkeeper hired by the year, at a salary payable quarterly. At the end of two months he is adjudged bankrupt. His manager or bookkeeper may prove for a proportionate part of his salary up to the time of the bankruptcy, but he cannot prove for any part that may accrue and fall due after the bankruptcy. The clear purpose of the bankrupt act is, to cut off all claims for rent to accrue, or for services to be rendered, after the date of the bankruptcy. These views, so far as the question of rent is concerned, are supported by the following cases: *Ex parte Houghton et al.*, 1 Lowell's Decs., 554; *In re Webb & Co.*, 6 N. B. R., 302; *In re May & Merwin*, 9 id., 419. The only case I have found where a contrary view is taken is *In re Winn*, 4 N. B. R., 23 (Chase's Decs., 227). In the case of *Trim*, 5 N. B. R., 23, cited by counsel for defendants, it does not appear whether the landlord was allowed to prove for rent which accrued after the bankruptcy or not. The case of *Longstreth v. Pennock*, 7 N. B. R., 449, also relied on by defendants, only decides that the assignee should pay the rent up to the date of bankruptcy, and for such time as he actually occupied the premises after bankruptcy. It does not decide that a claim for rent after the bankruptcy is provable; for what the assignee pays for the time during which he occupies the premises is part of the expenses of administration, and is not paid as a debt of the bankrupt estate. In the case of *Longstreth v. Fenner*, no rent was claimed or allowed beyond the time when the assignee delivered up the premises. The 19th section of the bankrupt act is so clear upon the point under discussion, that it would require very great weight of authority to show that the rent, falling due at fixed and stated periods after the date of the bankruptcy, could be proven as a debt against the bankrupt estate. The law says plainly that such a claim shall not be proven or allowed. I am, therefore, of opinion that the claim of Loeb & Brother, for rent falling due after the 28th of January, 1874, which was after the bankruptcy, and after the surrender of the premises by the assignee, cannot be proven or allowed as a debt against the bankrupt estate.

It seems to be a necessary consequence of this, that Loeb & Brother can have no lien upon the assets of the bankrupts for

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any such claim. The bankrupt estate owes them nothing; they have no debt which the bankrupt estate is liable to pay. The existence of a lien upon the bankrupts' goods presupposes a debt which their goods are liable to pay. As there is no claim or debt, there can be no lien. The language of the 20th section of the bankrupt act seems to sustain this view. It is when a creditor has a lien on the real or personal estate of the bankrupt "for securing the payment of a debt owing to him from the bankrupt," that provision is made for preserving the lien. Rent to accrue in the future cannot be called a "debt owing." In fact it is well settled that it is not a debt at all, contingent or otherwise. *Aurial v. Mills*, 4 T. R., 94; *Lansing v. Prendergast*, 9 Johns., 127; *Savory v. Stocking*, 4 Cush., 607; *Bosler v. Kuhn*, 8 Watts. & S., 183; *English v. Key*, 39 Ala., 115. In the case last cited, it was held by R. W. WALKER, J., that "except where it is payable in advance, no claim for rent arises until the lessee has enjoyed the premises for the whole time for which the payment of rent is stipulated to be made."

But even conceding that at the date of the bankruptcy there was a debt owing from the bankrupts to Loeb & Brother, on account of rent yet to accrue, which might be proved and allowed against the bankrupts' estate, is it a fact that under the laws of Alabama, such debt was secured by a lien upon the goods of the bankrupts found upon the leased premises? The statute under which Loeb & Brother claim their lien declares that "no execution must be levied on goods or chattels in possession of, and upon the premises of a tenant, held by lease for one or more years until the rent due, or to fall due during the current year, is paid or tendered to the landlord; * * * and the sheriff executing the writ must levy and sell as well for the repayment of the rent so tendered as for the satisfaction of the execution." Rev. Code of Alabama, sec. 2878. Clay's Digest of Laws of Alabama, p. 506, sec. 3, contains a similar provision applicable to crops. It declares that "the crop grown on any rented land in this state shall not be taken by virtue of any execution, or removed off the premises of any such rented land, unless the party so taking the same shall, before removal of the crop from such premises, pay or tender to the landlord or lessee thereof all

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money due for the rent of said premises at the time of taking such crop in execution; provided such rent or arrears do not amount to more than one year's rent; * * * and the sheriff, or officer levying the same, is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution money." This last cited law has been construed by the supreme court of Alabama. In *Frasier v. Thomas*, 6 Ala., 169, it was held that this law did not give the landlord a lien upon the crop raised on rented land; it merely declared that, as between the landlord and an execution creditor, the former should be entitled to preference to the extent of one year's unpaid rent. See, also, *Whidden v. Toulmin*, 6 Ala., 104.

I am unable to distinguish any material difference between the two statutes cited. If the latter does not give a lien, neither does the former. The ruling of the supreme court of Alabama, just cited, is followed in *North v. Eslava*, 12 Ala., 240, and *Denham v. Harris*, 13 id., 465. However much these rulings may be opposed by high authority, they are a construction of a law of this state which this court feels bound to follow.

As there was no execution levied in this case, I am of opinion that Loeb & Brother did not acquire any lien for rent on the goods of the bankrupt found on the demised premises. On all grounds, therefore, their claim to priority of payment, out of the proceeds of said goods, should be disallowed.

The result is, that the district court fell into error in recognizing the claim and lien of Loeb & Brother for \$600. The order of the district court complained of is therefore annulled, and the claim and lien of Loeb & Brother disallowed.

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MAY TERM, 1875.

ROBERT T. CHISHOLM vs. THE CITY OF MONTGOMERY.

1. The power to issue commercial securities, the consideration of which cannot be inquired into in the hands of a *bona fide* holder, is not inherent in municipal corporations, nor can it be implied from the ordinary police powers given to such corporations.
2. A municipal corporation is but a subordinate branch of the government; it represents the state sovereignty in a limited district for specified purposes, which are local government and police.
3. The power of taxation is given to municipal corporations as a means of carrying out these purposes, and a diversion of the revenues to other purposes is unlawful and *ultra vires*.
4. A municipal corporation possesses no powers except such as are given expressly or by necessary implication.
5. Such a corporation has no power, without express authority, to subscribe to the stock of a railroad or plankroad company.
6. A municipal corporation was authorized by a special act to borrow a specified sum of money, and issue its bonds therefor; the money was borrowed and bonds issued accordingly. *Held*, that the power was thereby exhausted and became extinct.
7. A municipal corporation, without authority of law, subscribed for stock in a plankroad company, and issued its negotiable securities in payment thereof. *Held*, that it was not estopped by the resolutions of the city council, the acts of its officers, or by the negotiable form or other matter appearing upon the face of the bonds, from denying the authority of its officers to pledge the faith of the city in aid of the said road, or to issue the said bonds.
8. The fact that plaintiffs are *bona fide* holders of bonds issued by a municipal corporation is not a good reply to a plea setting up the want of power in the corporation to issue them.

This was an action at law brought upon ten bonds for five hundred dollars each, purporting to have been issued by the city of Montgomery. The defense was the want of power in the city to contract the debt for which the bonds were given, and to issue the bonds.

There was no dispute between the parties about the facts in the case, and an agreed statement of the same was submitted to the court. From this the following facts appeared:

The charter of the city of Montgomery became a law on the 23d day of December, 1837, and by it there was conferred upon

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the city authorities the usual powers granted to municipal corporations, among which were the power to clean and keep in repair the streets and alleys, and to enact such laws and regulations as might be deemed necessary in relation to the streets and highways; also the power to do every other matter and thing which they might deem necessary for the good order and welfare of the city.

On February 2, 1846, express power was conferred on the city, by an act of the legislature, to raise a sum of money, not exceeding seventy-five thousand dollars, by the sale of city bonds for that amount. This power was exercised. The bonds were immediately issued, and the money raised thereby was applied to the erection of a capitol building in the city of Montgomery.

On the 2d day of February, 1850, the legislature chartered the Montgomery South Plankroad Company, with authority to "locate and construct a plankroad from the southern line of the city of Montgomery in a direct line south, as near as may be, crossing the Catoma creek at or near Norman's Bridge, and extending south for thirty miles, and to receive from the authorities of any city or town in which said road might terminate, or through which it might run, the use of any street or streets for the location and construction of said road, and the municipal authorities of any such city or town were authorized to grant to said company the use of any street or streets for the purpose aforesaid."

On February 22, 1850, the city council passed a resolution to subscribe twenty thousand dollars to the stock of this plankroad company; on September 12, 1850, the city council authorized the issue of the bonds of the city to pay for this stock, and they were issued on the 20th of the same month. They were negotiable in form, being payable to bearer in fifteen years after date. They were delivered by the city to the plankroad company, and were by it sold as stock securities in the market of Charleston, South Carolina, through brokers, at prices ranging from ninety to one hundred cents on the dollar. The bonds in suit are a part of said issue, and were bought by the plaintiff at par, in due course of trade, in December, 1850, before maturity of the bonds or any of the coupons attached thereto, and the plaintiff was the *bona fide* holder and owner of the bonds sued on by him.

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After the subscription of stock by the city, the plankroad company commenced work on its road, and constructed it from the Exchange Hotel, in the central business part of the city of Montgomery, running thence across the south line of the city to a point distant twenty miles, the city council having first granted to the plankroad company the right of way along Montgomery street from the said hotel to the city limits.

Interest was paid by the plankroad company on some of the bonds, so issued, up to January 1, 1855, and on others by the city up to January 1, 1858, and the stock purchased by the issue of the bonds was represented by the city in the control and management of the plankroad company. After January 1, 1858, no payment was made upon the bonds on account either of interest or principal.

By an act of the general assembly, approved February 25, 1860, passed at the instance of the city council, it was authorized to "extend" the said bonds by an issue of new bonds running ten years, provided that at an election, held for that purpose, a majority of the real estate owners in the city should vote in favor of "extension;" but if a majority should vote against "extension," then the law was to have no force or effect whatever.

The election was held under this act, and fifty-seven votes were cast for "extension," and one hundred and five against "extension."

After the result of the election was made known, the city council resolved, that said bonds, in the hands of *bona fide* holders "are a just and honorable liability of the city, and as such, some provision should be made for their payment."

The parties waived a jury and submitted the cause to the court upon the pleadings and agreed facts.

Messrs. John T. Morgan, Walter L. Bragg and Wm. S. Thornton, for plaintiff:

I. The defendant had power, under its charter, to make and issue the bonds:

1. Its powers relating to streets and highways were unrestrained and unlimited. Within the scope of these powers the city was its own judge of what property it would acquire, what streets it would have and how it would improve them. *Ely v.*

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City of Rochester, 26 Barb., 133; *Inhabitants v. New Orleans*, 14 La. An., 452; *Royalton v. Royalton & Westcock Turnpike Co.*, 14 Vt., 322, 323; *Callender v. Marsh*, 1 Pick, 418; *Graves & White v. Otis*, 2 Hill, 466; *Waddell v. The Mayor, etc., of New York*, 8 Barb., 95; *Smith v. The Corporation of Washington*, 20 How., 135.

2. To carry into effect these express powers, the power to borrow money and issue bonds is clearly implied. *Mills v. Gleason*, 11 Wis., 470; *People v. Brennan*, 39 Barb., 522; *State of New York v. City of Buffalo*, 2 Hill, 434; *State ex rel. Dean v. Common Council of Madison*, 7 Wis., 688.

3. In the exercise of these powers, the city had the same power to contract and bind itself that any other corporation, public or private, would have. Angell & Ames on Corporations, 9th ed., sec. 31; *Atkins v. The Town of Randolph*, 31 Vt., 237, 238; *New England Fire and Marine Ins. Co. v. Robinson*, 25 Ind., 536; *Brady v. The Mayor of Brooklyn*, 1 Barb., 584; *Madison Plankroad Co. v. Watertown Plankroad Co.*, 5 Wis., 173; *Allegheny City v. McClurkan*, 14 Penn. St., 81.

4. A plankroad is an improved highway, a public improvement, which comes within the rule of being "indispensable to the public interest and successful pursuit of even local business." *Mitchell v. Burlington*, 4 Wall., 274; *Rogers v. Burlington*, 3 id., 663. To authorize aid to such an improved highway, it is not necessary that it should even come within the city limits; it is sufficient if it be connected with the material interests of the city. *Talbot v. Dent*, 9 B. Mon., 535, 536.

5. In giving construction to the powers of a corporation, the language of the charter should, in general, be construed neither strictly nor liberally, but according to its fair and natural import with reference to the purpose and objects of the corporation. *Enfield Bridge Co. v. Hartford & New Haven Railroad Co.*, 17 Conn., 454; *City of Cincinnati v. Stone*, 5 Ohio St., 39; *Downing v. Mt. Washington Road Co.*, 40 N. H., 230. The power to issue the bonds in this case was unmistakable, for a portion of the plankroad was built within the city limits and along one of its streets.

II. The bonds and coupons, by universal consent, have all the

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qualities of commercial paper (*Mercer County v. Hackett*, 1 Wall., 83; *Meyer v. Muscatine*, id., 384; *Aurora City v. West*, 7 id., 105), and when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has the right to presume that they were issued under the circumstances which gave the requisite authority. *Gelpcke v. City of Dubuque*, 1 Wall., 203; *Murray v. Lardner*, 2 id., 110. The case is brought within the scope of this rule by the act of February 2, 1846, authorizing the city to issue bonds for seventy-five thousand dollars.

III. After the issue of the bonds the legislature, by the act of February 25, 1860, authorizing an extension of the bonds upon a vote of the real estate owners of the city in favor thereof, recognized the bonds as being the bonds of the city and ratified their issue.

1. The proof shows that the act was passed at the instance of the city council. It was a matter of sovereign discretion with the legislature whether or not it would recognize this bonded liability of the city as a debt, and thereby ratify it, and the court will presume that legislative discretion, in a case where it properly exists, has been properly exercised. *Cooley on Con. Lim.*, 186, 187; *The People v. The N. Y. Central R. R. Co.*, 34 Barb., 137; *The People v. Lawrence*, 36 id., 193; *Mayor of Baltimore v. The State ex rel.*, 15 Md., 376.

2. The subject matter of the act necessarily included by expression as well as direct implication the power exercised by the city in issuing the bonds.

3. Whenever a statute is passed in furtherance of an acknowledged principle of right and justice, every reason exists for its most liberal application. *Hoffman v. Hoffman*, 26 Ala., 545; *Walcott v. Pond*, 19 Conn., 597.

4. A loan or subscription, if made without authority, is valid if confirmed by subsequent legislative authority. *Bridgeport v. Housatonic Railway*, 15 Conn., 475; *Campbell v. The City of Kenosha*, 5 Wall., 194-205; *Atchison v. Butcher*, 3 Kan., 104; *Watson v. Mercer*, 8 Pet., 38; *Nutter v. Ricketts*, 6 Ia., 330; *Bartholomew County v. Bright*, 18 Ind., 93; *Thomas v. Leland*, 24 Wend., 65; *Town of Guilford v. Cornell*, 18 Barb., 615;

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Thompson v. Lee County, 3 Wall., 327; *Town of Guilford v. Supervisors of Chenango County*, 13 N. Y., 143; *Brewster v. The City of Syracuse*, 19 id., 116.

5. What is implied is as effectual as what is expressed. *Crossall v. Sherrard*, 5 Wall., 283; *United States v. Babbitt*, 1 Black, 61; *Haight v. Holley*, 3 Wend., 258; *Gouch v. Stowell*, Plowden, 366.

6. A ratification, whether express or implied, is equivalent to an original authority. *City of Kenosha v. Lampson*, 9 Wall., 478; *Beloit v. Morgan*, 7 id., 619; *Campbell v. City of Kenosha*, 5 id., 194.

7. A contract originally void may be made binding by an act of the legislature. *Wilkinson v. Leland*, 2 Pet., 627.

IV. Independent of the mere contract set out in the agreed facts, the plaintiff has the right to recover. By its transactions the city incurred liabilities which the law will enforce.

1. If a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. *Marsh v. Fulton County*, 10 Wall., 684; *Maher v. The City of Chicago*, 38 Ill., 266-273; *Gas Co. v. San Francisco*, 9 Cal., 469, 473.

2. The legal effect of the city's transaction, as set out in the agreed facts, was a loan of money for which the bonds sold by the plaintiff to the city were issued. *Rogers v. Burlington*, 3 Wall., 666, 667. The plaintiff can, therefore, recover on his count for money loaned.

Messrs. John A. Elmore and Wm. A. Gunter, for defendant:

I. The city had no power to issue the bonds:

1. When a power, exercised by the officers or agents of a municipal corporation, is not expressly given by the charter, and is not necessary and proper to carry out the purposes of the incorporation, the corporation is not bound. It is unnecessary to cite authorities on this point.

2. When the power is given, but the charter requires it to be exercised by particular persons or bodies, or in a specified mode, or for a specified purpose, if not so exercised, the act is as much *ultra vires* and void as if the power had not been conferred. *Zottman v. San Francisco*, 20 Cal., 96; *McSpedon v. Mayor*

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of *New York*, 7 Bos., 601; *City of Leavenworth v. Rankin*, 2 Kan., 351; *Butler v. Charlestown*, 7 Gray, 12; *Mayor of Baltimore v. Eschback*, 18 Md., 276; *The Floyd Acceptances*, 7 Wall., 666; *Head v. Insurance Co.*, 2 Cranch, 127; *White v. New Orleans*, 15 La. An., 667; *Dey v. Jersey City*, 19 N. J. Eq., 412; *Baltimore v. Reynolds*, 20 Md., 1; *Bank of U. S. v. Dandridge*, 12 Wheat, 64; *Diggle v. Railway Co.*, 5 Exchr., 442; *Homer-sham v. Wolverhampton Waterworks Co.*, 4 Eng. L. & E., 426; *Trustees v. Cherry*, 8 Ohio St., 564; *McCracken v. San Francisco*, 16 Cal., 591; *Argenti v. San Francisco*, 16 id., 255; *Pimental v. San Francisco*, 21 id., 251; *Peterson v. Mayor of New York*, 17 N. Y., 449.

3. There is a class of cases in which it has been held that when a power is given to be exercised by certain persons upon prerequisites to be ascertained by them and they exercise the power, a holder for value of negotiable securities issued thereunder need not go behind the authority. But in all cases of this class there was express legislative authority to issue the bonds upon certain conditions, and they were issued by the body entrusted with the power to do so, and with the power of determining that the conditions had been complied with. Of this class are the following cases: *Commissioners of Knox County v. Aspinwall*, 21 How., 544; *Bissell v. City of Jeffersonville*, 24 id., 287; *Moran v. Commissioners of Miami County*, 2 Black, 723; *Mercer County v. Hackett*, 1 Wall., 85; *Gelpcke v. Dubuque*, 1 id., 175; *Van Hostrup v. Madison City*, 1 id., 271; *Rogers v. Burlington*, 3 id., 654; *Supervisors v. Schenck*, 5 id., 783; *Lee County v. Rogers*, 7 id., 181.

4. A distinction must be drawn between the cases of municipal and private corporations. The officers of a private corporation may, under certain circumstances, without authority, or even against positive instructions, bind the corporation. *Farmers' Bank v. Butchers' Bank*, 14 N. Y., 623; *Merchants' Bank v. State Bank*, 10 Wall., 604. On the other hand, all persons who deal with a public corporation, or its officers, are bound at their peril to know whether the act done by its officers is authorized or not, or has been exercised as required by the terms of the charter. *Brady v. The Mayor*, 20 N. Y., 312; *City of Leaven-*

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worth v. Rankin, 2 Kan., 357-371; Swift v. Williamsburg, 24 Barb., 427; Halstead v. The Mayor, etc., 3 N. Y., 430; Marsh v. Fulton County, 10 Wall., 676; Horn v. Baltimore, 30 Md., 218; Bridgeport v. Railroad Company, 15 Conn., 475; Haynes v. Covington, 13 Sm. & Mar., 408, Taft v. Pittsford, 28 Vt., 286; Steam Navigation Company v. Dandridge, 8 Gill & J., 248; Hodges v. Buffalo, 2 Denio, 110; Dill v. Inhabitants, etc., 7 Met., 438; Branham v. San Jose, 24 Cal., 585; Sturtevant v. Alton, 3 McLean, 394; Wallace v. San Jose, 29 Cal., 180; State v. Haskell, 20 Ia., 276.

5. The city charter gave no power to the city authorities to subscribe to the stock of a plankroad company, and to issue bonds therefor. (a) A special authority to borrow money, when once exercised, is exhausted. Savings Bank v. Winchester, 8 Allen, 109. (b) The power of a corporation can never be extended by construction beyond the object of its creation. Cooley on Con. Lim., 195, note 2; Pearce v. Madison & Indiana Railroad Company, 21 How., 441.

II. The bonds having been issued without authority, are void in the hands of all persons. Marsh v. Fulton County, 10 Wall., 676; Clay v. Nicholas County Court, 4 Bush (Ky.), 154; Logansport v. Legg, 20 Ind., 315; Pimental v. San Francisco, 21 Cal., 351; Price v. Railroad Company, 13 Ind., 58; State v. Bergen, 33 N. J., 39.

III. There has been no ratification of these bonds.

1. Where contracts are ratified the ratification must be by a person or body having the power to ratify. Delafield v. The State of Illinois, 2 Hill., 159; Hotchin v. Kent, 8 Mich., 526; Marsh v. Fulton County, 10 Wall., 676; Dubuque Female College v. Dubuque, 13 Ia., 555; Estey v. Inhabitants of Westminster, 97 Mass., 324.

2. If the act be without the scope of the corporate authorities, no sort of ratification by them can make it good. Peterson v. Mayor of New York, 13 N. Y., 449; Brady v. Mayor, 20 id., 313; Hodges v. Buffalo, 2 Denio, 110; Gates v. Hancock, 45 N. H., 528; Reilly v. Philadelphia, 60 Penn. St., 467; Hood v. N. Y. & N. H. Railroad Company, 22 Conn., 502; Tread-

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well v. Commissioners, 11 Ohio St., 183; *Hopple v. Brown Township*, 13 id., 311.

3. The act of the legislature authorizing an "extension" of the bonds on a condition therein specified was no ratification of the bonds. (a) The act was to take effect upon a condition that never happened. (b) The city of Montgomery before the passage of the act was no more liable for these bonds than if they had never been made. To create a liability on the bonds by statute would be to make a contract between the parties—a matter beyond the power of legislation. *Hoke v. Henderson*, 4 Devereux, 15; *People v. Haws*, 37 Barb., 440; *Hasbrouck v. Milwaukee*, 13 Wis., 37; *Medford v. Learned*, 16 Mass., 215.

IV. The plaintiff cannot recover on the common counts. When a contract is void because entered into by a corporation in violation of or without authority of its charter, the party can neither recover upon the contract nor upon any implied liability in any form. *Brady v. The Mayor*, 20 N. Y., 317; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. The Mayor of New York*, 3 N. Y., 430; *Boom v. The City of Utica*, 2 Barb., 104; *Grogan v. San Francisco*, 18 Cal., 590; *Swift v. Williamsburg*, 24 Barb., 427.

BRADLEY, Circuit Justice. This action was brought to recover the amount of certain bonds and coupons thereto attached, issued by the corporate authorities of the city of Montgomery in the years 1850 and 1852, to aid in the construction of the Montgomery South Plankroad, and the Montgomery and Wetumpka Plankroad respectively, extending from points within said city to certain points several miles outside of its bounds.

The main question raised in the case is, whether the city authorities had any legal authority or power to issue said bonds. If they had, it is admitted that the plaintiffs are *bona fide* holders thereof, and entitled to recover; if they had not, no recovery can be had.

The original charter of the city was an act of the legislature of Alabama, passed December 23, 1837, which remained without material alteration, so far as the question involved in this case

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is concerned, until the bonds in question were issued. A careful examination of this charter does not disclose any authority to make or issue bonds or other commercial securities of a negotiable character. It confers upon the corporation the ordinary police powers which are given to municipal bodies — such as the power to pass by-laws and ordinances necessary and proper to prevent contagious and infectious diseases, to preserve the public health, to prevent and remove nuisances, to license and regulate shows and theatrical amusements, to restrain gaming, to establish night watches and patrol, to make, alter and regulate streets, to regulate the wharves, to erect and regulate markets, the conveyance of water, etc.

In 1846, a special act was passed authorizing the city council to raise seventy-five thousand dollars by the issue of bonds to that amount; which was immediately done, and the money was applied to the erection of the state capitol in said city. The power was exhausted and became extinct. This very act, however, shows the public sense as to the incapacity of the city to issue bonds without special authority.

The mode pointed out in the charter for raising revenues to meet the public expenditures was by taxation. Indebtedness incurred by the authorities at any time, in carrying out any of the prescribed objects of the charter, is undoubtedly binding on the city; but such indebtedness, and the ordinary certificates or vouchers given as evidence thereof, stand on a very different ground from that of commercial securities issued by the city officials, the consideration of which cannot be inquired into in the hands of a *bona fide* holder, and which might be issued to an extent involving the financial ruin of the city. It is the latter species of securities for the issue of which no authority can be found in the charter; and the power to issue these is not implied from the ordinary police powers given to a municipal corporation. *The Mayor v. Ray*, 19 Wall., 468.

In the next place, the charter contains no authority to aid or subscribe for stock in private corporations created for constructing works of internal improvement. The bonds in question were issued for this purpose, as is shown by a printed memorandum in their margin.

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A municipal corporation is but a subordinate branch of the government; it represents the state sovereignty in a limited district and for specified purposes. Those purposes are local government and police. The power of taxation is granted as a means of carrying out these purposes. The diversion of these revenues to other purposes is unlawful and *ultra vires*. If it is desirable that a municipal body should have the power of subscribing to railroads or plankroads, or of issuing commercial securities to be sold in the financial markets, it is time enough for it to do so when authorized thereto by legislation. It possesses no powers but such as are given to it expressly or by necessary implication.

These views were recently expressed by the supreme court of the United States in the case of *The Mayor v. Ray*, 19 Wall., 468, and substantially the same conclusion was reached by the supreme court of Alabama in the case of *The City of Montgomery v. The Montgomery & Wetumpka Plankroad Company*, 31 Ala., 84. The ruinous extravagance and demoralization which have resulted from the possession of unlimited powers of expenditure and issue of bonds by municipal bodies all over the country, evince the wisdom of these decisions.

My attention has been called to the charter of the plankroad companies in whose aid the bonds were issued; but I find nothing in them to supply the fundamental defect of want of power to grant the aid and issue the bonds in question.

Reference has also been made to an act passed in 1860, authorizing the city council to issue new bonds in the place and in extension of the issues of which the bonds in suit form a part, provided the owners of real estate resident in the city should vote consent thereto. But the vote was adverse to such reissue, and the law does not, if it could, cure the original defect of power in the issue of the bonds.

The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plankroads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the

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public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the speculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its officers, from denying their authority to bind it. *The Floyd Acceptances*, 7 Wall., 666.

Finally the plea that the plaintiffs are *bona fide* holders of the bonds cannot avail where the defense is want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been, whether certain preliminary conditions had been complied with, the plea might, under certain circumstances, have been a good one. No doubt the plaintiffs in these cases are meritorious holders of the bonds; and no doubt there are considerations of equity in their favor; and perhaps it is to be regretted that the citizens of Montgomery did not, in their own vindication, under the act of 1860, vote for a reissue and extension of the bonds. An eminent citizen* who was called upon, nearly twenty years ago, to investigate the rights of the parties holding these bonds, speaking for himself and a committee of which he was chairman, forcibly observed: "That the principles of common honesty, as well as a just regard for the credit of the city, demand that immediate provision should be made for the payment of the interest in arrear," etc., and he further observed: "The committee is aware that the authority of the city council in the issue of these bonds is questionable; that it is doubtful if such issue constitutes any valid legal obligation on the city; but as it was done in accordance with the deliberately expressed wishes of a large majority of real estate holders of the city, and as they would have derived the principal benefit in the increased value of their property, had the enterprise to promote which the bonds were issued proved successful, they do not doubt under such circumstances,

* Hon. Geo. Goldthwaite.

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that the same property holders who united in recommending the issue and loan will most cheerfully submit to the slight increase of taxation which is proposed."

Unfortunately, these anticipations have not, thus far, been realized; and the court, under the view of the law which I have been compelled to take, is powerless to afford relief.

There must be a finding and judgment for the defendant.

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1. Plaintiffs who had recovered a judgment against the county of Tallapoosa on coupons detached from bonds, which the board of county commissioners were authorized to issue, and to pay which the law made it their duty to levy and collect a tax, are entitled to the writ of *mandamus* to compel said commissioners to levy and collect the tax notwithstanding the fact that in a proceeding in equity (to which said plaintiffs were not parties), the chancery court had, before the recovery of said judgment, issued an injunction restraining the county commissioners from the levy and collection of any tax to pay said indebtedness, and said injunction still remained in force.
2. The act of the law as well as the act of God can always be pleaded in a court of justice, as an excuse for performing or not performing any given act.
3. A court of county commissioners being vested by law with certain judicial functions, and also the ministerial function of levying and collecting taxes, the writ of *mandamus* to compel the levy of a tax by such body cannot be regarded as derogating from the judicial dignity with which they are *ex officio* invested.

This was an application for the peremptory writ of *mandamus*. On the 16th of November, 1874, the plaintiffs recovered a judgment for \$3,570, against the county of Tallapoosa, Alabama. The judgment was based on certain coupons which had been detached from bonds issued by the county by authority of an act of the legislature of December 31, 1868, which authorized the court of county commissioners to levy and collect a tax to pay said coupons. On December 17, 1874, an execution was issued on the judgment and returned "no property found whereon to levy." The petition for the writ of *mandamus* alleged that the judgment remained unsatisfied, and that plaintiffs had no other

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remedy. The court of county commissioners is a body vested with certain *quasi* judicial, as well as ministerial powers.

The persons composing the court of county commissioners admit in their answer the recovery of the judgment against the county. They say it is not true that they have refused to levy the tax, but allege that for the years 1869 and 1870, they did levy and collect the tax, and pay the coupons falling due in those years; that in 1871, the county collector was proceeding to collect the tax for that year, when the tax payers of the county filed a bill to enjoin him from collecting the tax, and the court of county commissioners from levying any other tax for the same purpose. In accordance with the prayer of the bill, a writ of injunction was issued and served upon the collector and commissioners, which they obeyed. In November, 1873, the bill was dismissed, but an appeal was taken to the supreme court of the state, which was allowed and bond given, the effect of which was to continue the injunction in force. The cause is still pending on appeal and undecided. The commissioners say they dare not violate the injunction, and they are advised by their counsel that they need not do so.

To this answer the petitioners for the writ demurred, and upon this demurrer the cause was submitted to the court.

Mr. Samuel F. Rice, for petitioners, cited *Riggs v. Johnson County*, 6 Wall., 198; *United States v. Council of Keokuk*, id., 514; and *The Mayor v. Lord*, 9 id., 409.

Mr. Thomas H. Watts, *contra*, cited *Taylor v. Carryl*, 20 How., 583.

BRADLEY, Circuit Justice. We have looked at the authorities referred to by counsel in this case, and do not see the inconveniences and conflict of jurisdiction which the counsel for the defendants apprehends. It is conceded that the plaintiffs who recovered judgment against the county of Tallapoosa, were not parties to the litigation in the chancery court for the said county; and, although in that suit as well as in the suit on which the said judgment was recovered, the validity of the bonds and coupons sued on was in question, yet not being in question between the same parties, the two litigations were entirely independent of

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each other, and the action of the chancery court cannot be deemed a binding adjudication against the plaintiffs here. The court of county commissioners of Tallapoosa county is under injunction, it is true, not to do the very thing which a *mandamus* from this court would require them to do. But they cannot be embarrassed by this, because the act of the law as well as the act of God can always be pleaded in excuse of performing or not performing an act. The *mandamus* of this court would be an act of law which could thus be pleaded by the commissioners in excuse of not obeying the injunction; and such an excuse will undoubtedly be accepted by the chancery court. This is so, not because this court has any superiority over that court, but from the nature and circumstances of the case, and particularly from the fact that the plaintiffs in this case were not parties in that court. Had they been parties, and had they instituted suit and obtained judgment against the injunction of the chancery court, they would be guilty of contempt and answerable therefor to that court. But not being parties, they are not affected by the proceedings had therein, and cannot be deprived of the execution of their judgments.

The court of county commissioners in this proceeding is not to be regarded as a court of judicature, but as the administrative authorities of the county, having the ministerial duty to perform of levying taxes when the law makes it their duty to do so. Their duty in this regard is just as much a ministerial one as is that of the sheriff, when he has a writ in his hands commanding him to levy and make a sum of money out of the property of the defendant. As such ministerial officers, they have no interest, but simply to obey and carry out the law; and a *mandamus* cannot be regarded as derogating from any judicial dignity with which they are *ex officio* invested in relation to matters of judicature.

Under the authority of the cases decided by the supreme court of the United States, which were cited by the counsel of the plaintiffs, we think that a *mandamus* should be issued.

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1. An action for the malicious prosecution of a proceeding, to have plaintiff declared a bankrupt, is based on the supposed malice of the defendant, and want of probable cause for the prosecution of the bankruptcy proceeding.
2. A want of probable cause is evidence of malice sufficient to sustain the action, and will entitle the plaintiff to recover the actual damage sustained by him.
3. In order to a recovery of exemplary damages the plaintiff must show actual malice, that is, that the defendants willfully instituted and carried on the bankruptcy proceedings when they knew there was no ground therefor.
4. In order to justify a party in instituting proceedings in bankruptcy, he must be a creditor of the alleged bankrupt. He cannot justify himself by saying he had probable cause to believe himself a creditor, and also probable cause to believe his debtor had committed an act of bankruptcy.
5. Proceedings to put a debtor in bankruptcy should not be resorted to as proceedings *in terrorem* to collect a debt.
6. Where it had been adjudicated by the highest court of law in the state, that the petitioner had no claim against the party whom he sought to put in bankruptcy, and the bankrupt court had refused to make a decree adjudicating the alleged debtor a bankrupt, in an action for malicious prosecution, the latter was, beyond question, entitled to recover the damages he had sustained by the unlawful attempt to put him in bankruptcy.
7. In such a case, the measure of damages stated.
8. If the defendants had reason to believe that the plaintiff was indebted to them, and had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damages.
9. Where a decision of the supreme court of the United States declared a certain act to be an act of bankruptcy, a party reposing on such decision is protected from the charge of actual malice in a proceeding to put his debtor in bankruptcy, based on the ground that he had committed such act, even though such decision were afterwards modified, provided the creditor had probable cause to believe his debtor had committed the act charged.

This was an action at law, the nature of which and the facts upon which it was prosecuted and defended, are sufficiently stated in the charge of the court.

Messrs. Thomas H. Watts, Samuel F. Rice and James L. Pugh, for plaintiff.

Messrs. E. S. Shorter and J. T. Holtzclaw, for defendants.

BRADLEY, Circuit Justice, charged the jury as follows: This action is brought to recover damages sustained by the plaintiff

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in consequence of bankruptcy proceedings instituted against him by the defendants, on the 15th day of August, 1873, and the charge in the complaint is, that the defendants on that day not having any debt or demand against the plaintiff, or any other reasonable or probable cause therefor, but wrongfully, maliciously, vexatiously, recklessly and oppressively filed their petition against him in the district court of the United States at Montgomery, wherein they falsely alleged that they were creditors of plaintiff to the amount of over \$3,000, or other large sum, and among other things, also falsely alleged that plaintiff was insolvent and a bankrupt, and also falsely alleged that he, in view of bankruptcy, had committed an act of bankruptcy in violation of the bankrupt laws of the United States, and prayed that he might be adjudged a bankrupt, he never having committed or been guilty of any act of bankruptcy; and also for a writ of injunction restraining him from managing or controlling his estate; which injunction was issued and served and obeyed; that the defendants in said petition also prayed for a warrant or writ of seizure, to issue from said district court, which writ was also issued, and by virtue thereof the marshal of the district seized and took possession of the entire stock of goods belonging to plaintiff, in the city of Eufaula, on the 16th of August, 1873, and deprived the plaintiff of the possession thereof, and his store was closed and his business was suspended, broken up and destroyed; and his said property was not restored to him until September, 1874, after the proceedings in bankruptcy were dismissed, and that said goods were packed up and greatly injured during the period between the said seizure thereof and restoration to the plaintiff, to at least two-thirds of their value. The petition further states that when said bankruptcy proceedings were commenced, an action was pending in the circuit court of Barbour county, brought by the defendants to recover the claim or debt which they alleged that he owed to them, and on which they founded their said proceedings in bankruptcy, and that this suit was afterwards determined against the defendants, and a judgment rendered in favor of the present plaintiff; thus determining that the defendants had no legal claim or demand against him. The petition further alleges that

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the bankruptcy proceedings were nevertheless continued, but were finally dismissed by said district court.

The plaintiff claims damages for the injury done to his goods, his business, and his credit as a merchant, and for his loss of time and expenses for lawyers' fees, and charges in defending himself; and also asks for exemplary damages for the willful and malicious proceedings of the defendants.

We instruct the jury that the action is based on the supposed malice of the defendants, and want of probable cause for the prosecution of the bankruptcy proceeding complained of. The plaintiff cannot recover damages against the defendants for the mere wrongful prosecution of the proceedings in bankruptcy; but it must also be shown that they had no probable cause therefor. A want of probable cause is evidence of malice sufficient to sustain the action, and will entitle the plaintiff to recover the actual damage which he has sustained. If the plaintiff desires to recover exemplary damages, or smart money (as it is called), he must show that the defendants were guilty of actual malice; in other words, that they willfully instituted and carried on the bankruptcy proceeding, when they knew that there was no ground therefor.

It is necessary, however, in this case, to qualify the foregoing remarks by the further statement that, in order to justify a party in instituting proceedings in bankruptcy, he must be a creditor of the alleged bankrupt. There must be a legal debt or demand as the basis of the petitioner's right to proceed. If the defendants in this case were actual creditors of the plaintiff, they could defend themselves from the charge of maliciously instituting bankruptcy proceedings against the plaintiff, by showing that they had probable cause to believe that he had committed an act of bankruptcy. Though the court of bankruptcy decided against them, and dismissed the proceedings, they could still plead that they had such probable cause for their action. But if they had no legal claim or demand against the plaintiff, then, whether they had such probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that, though they had not a legal debt or claim against him, they thought they had; in other words, that they had probable cause

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to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all. Their defense cannot stand upon two probable causes, one on the top of the other. They had no right to petition that the plaintiff be declared a bankrupt unless they were his creditors. Their right so to do depended on this fact; and they took on themselves the risk of having such legal demand.

Throwing a man into bankruptcy is a serious proceeding, and should not be lightly resorted to; and ought never to be resorted to, as a proceeding *in terrorem* to collect a debt. The petition of the defendants may have been sufficient to give the district court jurisdiction of the bankruptcy proceedings, and to validate a decree of bankruptcy, had one been made; because all the creditors of the bankrupt would have been interested in the decree. If such a decree had been made, the plaintiff could not probably have sustained this action. But as no such decree was made, and as the proceedings, on the contrary, were dismissed, and as it has been adjudicated by the circuit court of Barbour county, and affirmed by the state supreme court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court, therefore, rules that the defense in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but, it being shown by judicial determination that they had no legal debt or claim against the plaintiff, and had, therefore, no right to institute the bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of those damages under the circumstances of the case.

If, however, the plaintiff seeks to recover exemplary damages, he can only do so on the ground of actual malice on the part of the defendants. *Sharp v. Hunter*, 16 Ala., 765. And on that question the whole conduct and motives of the defendants are open to examination; and if they had probable cause for believing that their claim against him was valid, and that he had com-

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mitted an act of bankruptcy, they are not chargeable with exemplary damages.

We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained, at all events, but that you cannot award exemplary damages also against the defendants, unless you believe from the testimony that the defendants were guilty of actual malice.

I. The damages to be allowed the plaintiff, are:

1. The actual damage to his goods, which, as he testifies, were finally sold for only \$3,650; and which, when seized, he swears were worth, at invoice or cost prices, some \$13,000 or \$14,000. His clerks corroborate this statement; but two other witnesses, who examined and measured the goods at the time or shortly after they were seized by the marshal, and who estimated their cost value by the same marks, say they amounted to only \$8,042. This discrepancy is notable. The evidence is to be weighed by the jury, and the true value of the goods when seized is to be estimated by them. It is to be noted that the latter witnesses, or one of them, think that the goods looked like a lot of auction goods.

2. Damages are to be allowed the plaintiff for the breaking up of his business and the destruction of his credit. His business was estimated by himself at from thirty-five to forty thousand dollars a year, and sometimes more, with a gross profit of thirty-three and a third per cent. From this, however, are to be deducted his expenses and the value of his own time. To this, you are to add the loss of the rent of his store in Texas, if he lost anything therefrom; though of this he has not offered any proof. The value of his own time is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able to pursue any business.

3. His expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy are also a fair item of charge to be allowed in your estimate of the damages sustained by the plaintiff.

It has been claimed that the destruction of the plaintiff's credit is a distinct item of damage; but perhaps this is to be considered as incorporated with his business, and the injury

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thereto as included in the damage for breaking up said business. The jury will judge whether any separate allowance should be made therefor.

II. On the question of express malice, the whole conduct of the parties and circumstances of the case are to be taken into consideration. If the defendants had reason to believe that he was liable to them for the debt claimed, and if they had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damages.

1. As to the reason which the defendants had to believe that they had a legal demand against the complainant:

That the defendants had a claim to the amount sued on by them against the firm of E. Leitziger & Co. (whoever that firm was when the debt was contracted) is not disputed. The question was, whether Sonneborn was a member of that firm and therefore liable. That he had been a member of the firm in 1865 and 1866, is conceded. The debt was contracted in the early months of 1867, January, February and March. It is clearly proved that on the 19th of March the defendants were informed that Sonneborn was no longer a member of the firm. The question in dispute between the parties is, whether they had been notified before that time of his retirement. They allege that they had not. The complainant alleges that they had. The importance of this question arises from the principle of law, that if a man is known to be a member of a firm once, he will be deemed to continue a member until notice is given to the contrary. Parties dealing with the firm and giving the credit have a right to consider all the partners as remaining in the firm until they are notified that any of the partners have retired. Now Sonneborn contends that he himself gave the notice; but he only gave notice to one of the selling clerks. It may be questioned whether such notice, if given, would be sufficient. It is contended that notice was given by the clerk of the firm of Leitziger; also that a young gentleman called in their store and said he was from Stewart's, and that notice was given to him. The witnesses on the part of the defendants are very positive that no notice was ever received. The somewhat varying and

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conflicting evidence is before you, and it is for you to judge whether any such notice ever was given. If not given, Sonneborn was liable for the debt. It is for you to judge whether the defendants had reason to believe that it had never been given. If they had, then the fact that they failed to recover a judgment against Sonneborn would not be conclusive evidence that they commenced the proceeding in bankruptcy in bad faith and with actual malice.

2. As to probable cause for believing that the complainant had committed an act of bankruptcy.

The ground for supposing that the complainant had committed an act of bankruptcy was not without evidence to support it. The judgment recovered against him by his brother on the 12th of June, 1873, in a suit commenced just thirty days previous, a few days after getting a continuance of the defendant's action, without defense, without an effort to get delay, brought by the complainant's own attorney, were circumstances well calculated to induce the belief that the defendant contemplated bankruptcy.

The fact that the complainant had issued handbills to advertise the sale of his whole stock of goods was calculated to give intensity to the supposition. Then, the fact that the defendants, before proceeding, consulted their counsel and did not undertake the proceedings in bankruptcy until advised that there was good ground therefor, may also be taken into consideration on this question.

All these circumstances may be taken together, and weighed by the jury in deciding the charge that the defendants were governed by actual malice against the complainant.

The law as it stood at that time, adjudged by the supreme court of the United States, was almost conclusive against the complainant on the question of his liability to be put into bankruptcy. In the case of *Buchanan v. Smith*, 16 Wall., 277, that court held that when an insolvent debtor suffers a judgment to be obtained against him, whereby the judgment creditor obtains a preference, it is an act of bankruptcy. That was what occurred in this case. Sonneborn suffered such a judgment to be recovered against him, large enough to absorb a large part, if not the whole of his goods, if sold on execution. This

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was considerable proof of insolvency as well as of an act of bankruptcy. The decision referred to has been modified since, it is true, by a decision in a later case; but it was a sufficient declaration of the law for the time being to protect persons from a charge of actual malice in reposing upon its authority.

You have two questions to decide :

1. The actual damages sustained by the complainant. That you will give him a verdict for at all events.

2. Whether the defendants were guilty of actual malice in prosecuting the proceedings in bankruptcy, and if they were, what exemplary damages should be awarded against them.

Such exemplary damages, if any are allowed, are to be added to the actual damages in the amount of the verdict to be rendered.

AT CHAMBERS, JUNE, 1875.

MASON YOUNG et al. vs. THE MONTGOMERY & EUFAULA RAILROAD
COMPANY et al.

1. It is not necessary to aver matter of law or public statute, of which the court takes judicial notice.
2. Where a state is concerned in the subject matter of the suit, it should be made a party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party.
3. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party in a suit brought by holders of bonds secured by the mortgage to foreclose the same.
4. A state indorsed the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property: *Held*, that the fact that the state could not be sued was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state and have the benefit of the security.
5. An act of the legislature authorized the governor to indorse in behalf of the state the first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his indorsement as the authority therefor: *Held*, (a) That the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold. (b) That *bona fide* holders for value, of

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the bonds indorsed by the governor assuming to act under said authority, were not to be charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds.

6. An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that this law did not pass the legislature by the vote required by the constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds: *Held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything.
7. When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of coördinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him.
8. Junior mortgagees may file a bill to foreclose their mortgage without making prior mortgagees parties, but a sale in such a case would necessarily be made subject to the prior mortgages.
9. In such a suit, the prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them.
10. If, however, such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them.
11. When junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun, until the first is ended.

This was a cause in equity which by consent was heard at chambers in Mobile, in June, 1875, on demurrer to the bill.

Messrs. Geo. W. Stone, David Clopton and James T. Holtzclaw, for complainant.

Messrs. Samuel F. Rice, D. S. Troy and H. C. Tompkins, *contra*.

Woods, Circuit Judge. The defendant company is an Alabama corporation, which has constructed and equipped a railroad from Montgomery to Eufaula in said state. The case made by the bill is substantially as follows :

The complainants are holders of certain bonds belonging to a

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class of bonds issued by the defendant railroad company and indorsed by the state of Alabama; twelve hundred and eighty of these bonds, for \$1,000 each, were issued, indorsed by the state and put in circulation, and the indorsement was put upon said bonds before they were disposed of by the railroad company. One thousand of these bonds bear date the 31st of August, 1867, and are payable on the 1st day of March, 1886. To each of these bonds are attached coupons, thirty-seven in number, one on each bond for the payment of \$40 in United States gold coin, on the first day of March, 1868, and others severally for the payment of a like sum in like coin, at the end of each six months thereafter, until the bonds themselves became due. The other two hundred and eighty bonds are substantially like the thousand bonds first named, with a like indorsement, but the date of these bonds and the date of their maturity is not stated in the bill.

The indorsement upon all the bonds is in these words: "In pursuance of an act of the legislature of the state of Alabama, approved February 19, 1867, entitled an act to establish a system of internal improvements in the state of Alabama, the undersigned, governor of the state, hereby for the state, indorses this bond and makes the state liable for its payment; the Montgomery & Eufaula Railroad Company having complied with the conditions upon which the undersigned is required on the part of the state to give such indorsement. In witness whereof, the undersigned, governor of the state of Alabama, has hereunto set his hand, this — day of —, 1866. (Signed) R. M. PATTON, Governor of the state of Alabama."

All of these bonds bear date before the first of March, 1873, but may have different dates and the indorsement of different governors, and are numbered serially, from one up to twelve hundred and eighty.

The bonds held by complainants were sold before March 1, 1873, at not less than ninety cents on the dollar, and were put in circulation, and complainants became the owners of such of said bonds as are specified in a schedule annexed to the bill *bona fide* and for a valuable consideration, and the bonds held by complainants amount to \$215,000.

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No mortgage was executed by the railroad company to secure these bonds, the company being advised by its counsel that no mortgage was necessary.

No interest has been paid to the complainants on their bonds since the first day of September, 1872, and the railroad company is, and for more than two years has been, insolvent.

The railroad and its property is, and for a long time has been, in the possession and control of the defendant, Andrew J. Lane, who by virtue of an appointment made in a suit brought by Samuel A. Strang against the said railroad company in the interest of certain persons, claiming to be second mortgage bondholders; such suit is pending in the circuit court of the United States for the southern district of Alabama. The bonds on which that suit is based show upon their face that they are second mortgage bonds, and that the mortgage by which they are secured is subject to the prior lien of the series of 1,280 bonds before mentioned, part of which complainants hold; and the bill of complaint under which said Lane holds as receiver, admits the prior lien of said 1,280 bonds.

It is charged that Lane, at the time of his appointment as receiver, was, and long before had been, the president of the said railroad company, and was a large creditor thereof, was interested as a stockholder and as a holder of a large number of said second mortgage bonds.

It is alleged that the answer of the railroad company to the bill filed by Strang was dictated by Lane; that he was appointed receiver on the same day the bill was filed; that he was authorized to take possession of the road and property of the railroad company and manage and run it, and, on application to and approval of the court, to borrow money on his certificates for the purpose of repairing and running the property of the company; that on the 15th day of July, 1872, he applied to the court for leave to borrow \$60,000, which was granted on the 19th of July, 1872.

It is alleged that on the 31st of January, 1873, Lane applied to the court for authority to pay Lehman, Durr & Co., bankers, the sum of \$12,202.09, which he, as receiver, had overdrawn, in order to meet taxes and executions, which

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would have stopped the operations of the road; and the court ordered him to make the payment out of the earnings of the road.

The bill alleges, on information and belief, that Lane has filed no reports or accounts, and that a report made by him to the bondholders shows that he has expended the money, borrowed by authority of the court, for other and different objects than those authorized by the orders of the court. (I may say in passing that I have read the report referred to, which is alluded to in the bill as Exhibit No. 5, and it totally fails to sustain the allegations of the bill.) Other complaints are made of the receiver Lane, that he has applied to the court and obtained orders which the court ought not to have granted.

The bill alleges further that the complainants cannot learn from the report of Lane, the receiver already referred to, whether the railroad has realized any and, if any, what net profits. It alleges that the South & North Alabama Railroad Company, by petition, had itself made a party defendant, and has filed a cross-bill in the said suit of Samuel A. Strang, in which it claims that it has a first lien upon said railroad for many thousand dollars; but complainants aver that by virtue of the laws of Alabama, under which the bonds held by them were indorsed, their bonds are the first and best lien on the road, complainants having purchased their bonds without notice of any older lien.

It is further alleged, "that leave has been obtained from Hon. W. B. Woods, one of the justices of the circuit court of the United States for the southern district of Alabama, to bring suit against the said Andrew J. Lane, receiver, in the circuit court for the middle district of Alabama, on the claims of complainant hereinbefore set forth." Such are the averments of the bill.

The Montgomery & Eufaula Railroad Company, the South & North Alabama Railroad Company, the said Andrew J. Lane, receiver as aforesaid, and William Fowler and Thomas Pullum, who are averred to be the trustees of the second mortgage executed by said Montgomery & Eufaula Railroad Company, are made defendants to the bill; and the prayer of the bill is, that this court will remove and take the said railroad and all the property and assets of the company and its control and manage-

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ment out of the custody and direction of the said Andrew J. Lane; that complainants, and all others in similar rights with them, who will come in and contribute to the expenses of the suit, may be subrogated to the lien and rights of the state of Alabama upon the property and franchise of said railroad company, and said lien established and purchased; that the property and effects of the said company may be administered in this court, and said property and assets and its income and profits be appropriated by sale or otherwise to the interest due on the bonds held by complainants and others in similar right; and that an account may be taken of the proceedings and administration of said Lane, etc., and for general relief.

In order to understand clearly the case made by the bill, it is necessary to refer to the act of the state of Alabama of February 19, 1867, as subsequently amended, by virtue of which the governor indorsed the bonds of the railroad company.

This act (sec. 1) authorizes and requires the governor "to indorse in behalf of the state the first mortgage bonds of any railroad company in the state having completed and equipped twenty continuous miles of railroad, at the rate of \$12,000 per mile, for each section of twenty miles so completed and equipped."

The act further provides (sec. 4) that the railroad company is authorized "to issue the bonds of the company for such amount as it may determine, bearing interest at a rate not to exceed eight per cent. per annum, the interest to be paid semi-annually; * * said bonds when indorsed by the governor on the part of the state shall recite the fact that they are first mortgage bonds, issued in accordance with and upon the conditions of this act; and said first mortgage and bonds issued thereon shall have priority in favor of the state (over) any and all other liens whatever." See Acts of Alabama for 1866, 1867, p. 680.

It is plain that the theory of complainants is, that the governor having indorsed their bonds in behalf of the state, this act constitutes a statutory mortgage prior in equity to all other claims; that this mortgage was intended to secure the state against its indorsement, and the bonds having come to the hands of complainants as *bona fide* holders, they are subrogated to the rights of the state, and the lien of the state enures to their benefit.

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The failure of the railroad company to execute a trust deed on its property to secure these bonds has placed the bondholders in this embarrassment: that there are no trustees to represent their interest, and they are compelled to appear personally in any suit which affects their interest in the property.

Separate demurrers have been filed to the bill by Andrew J. Lane, by the Montgomery & Eufaula Railroad Company, and by the South & North Alabama Railroad Company.

Several of the grounds of demurrer have been avoided by an amendment to the bill. These it is unnecessary to notice. In examining the remaining causes of demurrer, I shall pursue such order as may seem most convenient.

I remark in the outset that the demurrers are filed to the whole bill and not to any specified parts of it. In order, therefore, to sustain the demurrers, the grounds alleged for some of them must extend to the whole bill. Those which refer to or affect only a part of the bill cannot be a ground for a dismissal of the entire bill.

The first ground of demurrer which I shall notice is, that the state of Alabama is not made a party, and no reason is given why she is not made a party.

The state cannot be sued in a court of the United States. The XIth amendment to the constitution of the United States excludes the jurisdiction. She cannot even by her own consent be made a party complainant, for that would oust the jurisdiction of the court, the principal defendant being a citizen of the state of Alabama. As this is matter of law and public statute, of which this court takes judicial notice, it was unnecessary to aver in the bill the reason why the state was not made a party. Does the fact that the state cannot be made a party excuse her absence from the suit, and can the bill be maintained unless she is a party?

Where a state is concerned, the state should be made a party if it can be done; that it cannot be done is a sufficient reason for the omission to do it. *Osborn v. The Bank of the United States*, 9 Wheat., 378; *Davis v. Gray*, 16 Wall., 220.

The state is in the position of surety on these bonds on which the suit is based, having received from the railroad company,

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the principal debtor, indemnity in the form of a statutory lien upon the property of the railroad company. The complainants hold the bonds, and ask a decree against the railroad company for the unpaid interest accrued thereon, and the sale of the property pledged as security; no relief is or can be sought against the state. The state, it is true, is interested in having the pledged property fairly applied to the extinguishment of its liability, and this court will take care, as it should, that this is done. The fact that the state is thus interested in the property is no reason why she must necessarily be made a party to a suit in which no decree is sought against her. The indorser of a note secured by a mortgage is not a necessary party to a suit to foreclose the mortgage. If the state has paid any interest on these bonds, and is thereby entitled to any part of the proceeds of the mortgaged property, she can propound her claim before the master and it will be allowed.

Suppose we turn the complainants out of this court because the state is not a party. If they go into the state court, they are met by the same difficulty, for the state will not allow herself to be sued in her own courts. Can it be possible that these complainants are without remedy against the railroad company because their bonds are indorsed by the plighted faith of the state of Alabama? It would be a reproach to the administration of justice to so hold.

It is set up as another ground of demurrer, that as the state cannot be sued, the complainants cannot be subrogated to the rights of the state under the statutory mortgage which secures the bonds. The law of subrogation is the creation of equity. It is resorted to to prevent a failure of justice. 1 Story's Eq., §§ 327, 499, 499a, 638; *Moses v. Murgatroyd*, 1 Johns. Ch., 119.

In view of this fact, it would be a strange proceeding for this court, sitting as a court of equity, to deny the right of subrogation in this case, because the state cannot be made a party here, while she refuses to be a party elsewhere.

It is next alleged, as a ground of demurrer to the bill, that in fact there is no statutory mortgage or lien upon the property of the railroad company to secure the bonds held by complainants, because the governor had no authority to indorse these bonds.

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His indorsement is therefore void. The state incurred no obligation by reason of the manual indorsement of the governor, and consequently no lien was created thereby to indemnify the state. There was no liability against which the state could be indemnified.

This claim is based on two grounds: (1) Because the statute authorizes only the indorsement of bonds bearing eight per cent. interest, and these bonds bear eight per cent. interest in gold; and (2) Because the statute authorizes the indorsement of first mortgage bonds only, and the public statutes of the state of Alabama show that the bonds in suit are not first mortgage bonds.

Does the fact that the interest on the bonds is eight per cent., payable in gold, make the interest greater than eight per cent.? The defendants claim that it does; that of necessity the agreement to pay in gold is an agreement to pay more than eight per cent. in currency. I cannot assent to this. It depends entirely upon contingencies, which cannot be foreseen, whether interest in gold is better than interest in currency. If gold is at a premium when the interest falls due, then it would take more than eight per cent. in currency to pay the interest. If it is not, it would take just eight per cent. If gold was at a discount, as under many circumstances it might well be, then eight per cent. in currency would more than pay the interest. Suppose the agreement were to pay eight per cent. in demand treasury notes of the United States, which are a legal tender, and they, when the interest was due, happened to be at a premium, as compared with United States notes, also a legal tender, would that really make the rate of interest greater than eight per cent.?

When the legislature authorized the indorsement of bonds bearing eight per cent. interest, the fair construction was that it meant eight per cent. in any legal tender currency on which the parties might agree. At the time of the passage of the act "there were two descriptions of lawful money in use under the acts of congress, in either of which damages for nonperformance of contracts, whether made before or since the passage of the currency acts, might be properly assessed in the absence of any different understanding or agreement between the parties." *Butler v. Horwitz*, 7 Wall., 258.

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But I place my decision upon this point on the ground that a contract to pay eight per cent. interest in gold is not a contract to pay more than eight per cent., because when the interest falls due, gold may happen to be at a premium.

This same question substantially has been decided by the supreme court of the United States, in *Meyer v. The City of Muscatine*, 1 Wall., 391. In that case authority was conferred upon the city of Muscatine to issue bonds bearing a rate of interest "not higher than ten per cent. per annum." The interest on the bonds was made payable semi-annually. This method of payment increased the burden on the city, and was an advantage to the bondholder. It, in fact, and under all circumstances, amounted to a higher rate of interest than ten per cent per annum. It was objected that by issuing such bonds the authority conferred upon the city was transcended, and a usurious rate agreed to be paid, but the supreme court held otherwise, and sustained the bonds.

I am of opinion, therefore, that the governor was not precluded by the law from indorsing the bonds because the interest was payable in gold.

The second ground, upon which it is claimed that the governor was without authority to indorse the bonds is, that there was a prior mortgage upon the railroad company's property, and the bonds indorsed could not, therefore, be first mortgage bonds.

Let us concede, what defendants claim, that there was a prior mortgage on the road at the date of these bonds. Were the holders of the bonds under the necessity of taking notice of that fact, and does the fact make the bonds void in the hands of a *bona fide* holder for value?

If the governor was without any authority to indorse any bonds, his indorsement would be void. If the law authorized him to indorse the bonds of the A. & C. Railroad, and he undertook to indorse the bonds of the South & North Alabama Railroad, his indorsement would be void. But in this case there is no dispute that the law authorized him to indorse the bonds of the Montgomery & Eufaula Railroad, on the conditions that there should be completed and equipped twenty miles of road

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before any indorsement, and that the indorsement should not exceed \$16,000 per mile of completed railroad, and that the bonds indorsed should be first mortgage bonds. The authority of the governor to indorse such bonds on such conditions is not disputed. Now, suppose the governor indorses such bonds of a railroad company before twenty miles of its road are completed and equipped, or indorses the bonds at a rate greater than \$16,000 per mile, are the bonds on that account void in the hands of a *bona fide* holder? Clearly not. The unbroken authority of cases decided by the supreme court of the United States is to the effect that such bonds are valid. *Knox County v. Aspinwall*, 21 How., 539; *Mercer County v. Hackett*, 1 Wall., 83; *Meyer v. Muscatine*, id., 384.

In the case last cited the supreme court says, "that if the legal authority was sufficiently comprehensive, a *bona fide* holder for value has the right to presume that all precedent requirements have been complied with." See, also, *Grand Chute, v. Winegur*, 15 Wall., 355.

But do these authorities cover the case where an indorsement is authorized of first mortgage bonds, and the governor indorses bonds of a railroad company whose property is subject to a prior mortgage? After some hesitation I have come to the conclusion that they do.

Unquestionably the duty is imposed on the governor by the Internal Improvement Act, as subsequently amended (Acts of 1866-7, p. 686), to decide whether the conditions precedent to the indorsement have been complied with. "When any railroad company," says the law, "shall have finished, completed and equipped twenty continuous miles of road, it shall be the duty of the governor, and he is hereby required, to indorse on the part of the state the first mortgage bonds of said railroad company to the extent of \$16,000 per mile," etc. It is as much his duty to ascertain that the bonds to be indorsed by him are first mortgage bonds, as it is to ascertain that twenty miles of the railroad have been completed and equipped. These conditions stand on precisely the same ground, namely, that the security of the state for its indorsement may be sufficient.

The law not only makes it the duty, but gives the governor

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the authority, to determine these facts, and having determined them, to indorse the bonds. The legal authority to make the indorsement is sufficiently comprehensive to include the indorsement of the bonds in question; and the governor having placed his indorsement upon the bonds and certified in the indorsement itself that it was made in pursuance of the act of the legislature, I think a *bona fide* holder has the right to presume that all precedent requirements have been complied with, and that there are no prior liens upon the railroad; and, so far as he is concerned, this presumption cannot be rebutted.

But defendants say, that the holders of these bonds are bound to take notice of what is contained in the statutes of the state of Alabama, and that the act approved December 30, 1868 (Laws of 1868, p. 497), entitled "an act to authorize the governor to indorse the bonds of the Montgomery & Eufaula Railroad Company, issued under the act of 19th of February, 1867," and its amendments, shows upon its face that the bonds of the railroad company were not first mortgage bonds. This act declares, "That the governor of this state be, and he is hereby, authorized to indorse the bonds of the Montgomery & Eufaula Railroad Company, to the extent authorized by the act to establish a system of internal improvements in the state of Alabama, passed and approved February 19, 1867, and the amendments made to said act, notwithstanding the indebtedness of said company to the state of Alabama for \$30,000, and the mortgage made by said company to the state under the act approved 17th February, 1866. Provided, that all sums of money which have been heretofore advanced by the state of Alabama, by the indorsement of bonds hitherto, shall be reckoned and regarded as so much of the amount authorized to be extended to said road by the authority of this act."

If this is a valid enactment, it covers completely any want of authority in the governor to indorse the bonds of the railroad company by reason of a prior mortgage. It is a ratification of his indorsement, and makes it good and valid in all respects; this is conceded. But the defendants say, it was not passed by the number of votes required by the constitution of the state for the passage of such an act, and that the journals of the legisla-

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ture show the fact; that it is therefore null and void, and no law at all.

If this position be true, what becomes of the claim, that the bondholders were bound to take notice of its contents? If it is no law, it is not constructive notice to anybody of anything. It is without effect, to all intents and purposes. It cannot be said that a bondholder in Europe or New York is bound by constructive notice of an act that never passed the legislature, but which by some mistake of the printer, or some one else, found its way among the published acts of the state.

I am of opinion, therefore, that the bonds of the Montgomery & Eufaula Railroad Company in the hands of *bona fide* holders are valid, that the indorsement of the governor is valid, and that by said indorsement the state acquired a valid lien upon said railroad property, superior to all other liens, unless it be that of the South & North Alabama Railroad Company. Whether the lien of complainants is better than that of the South & North Railroad Company, it is not now necessary to decide.

I have noticed all the grounds of demurrer which go to the entire bill, and am of opinion that none of them are well taken, and the demurrer must therefore be overruled.

A question, raised by one of the grounds of demurrer and much discussed during the argument, was whether this court would, if the bill was sustained, appoint a receiver to take possession of the property of the defendant railroad company, according to the prayer of the bill.

It seems to me that there can be but one answer to this question. It appears from the bill that a suit to foreclose the second mortgage, executed by the defendant railroad company, is now pending in the United States circuit court for the southern district of Alabama; and that in that case the defendant Lane has been appointed receiver, that he has taken possession of all the mortgaged property, and is administering it under the order and directions of the court.

If there are any adjudged cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in actual possession of the property, they have never fallen under my observation.

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The authorities all sustain the contrary doctrine. *Smith v. McIver*, 9 Wheat., 532; *Williams v. Benedict*, 8 How., 107; *Wiswell v. Sampson*, 14 id., 52; *Taylor v. Carryl*, 20 id., 583; *Chittenden v. Brewster*, 2 Wall., 191; *Mallet v. Dexter*, 1 Curt., 178; *Alabama & Chattanooga R. R. Co. v. Jones*, 7 Bank. Reg., 145; *Memphis City v. Dean*, 8 Wall., 64.

These authorities show that a question, which is pending in one court of competent jurisdiction, cannot be raised and agitated in another court; much less can one court assume to take possession of and administer property which is in the possession of another court and in course of administration by it. Nor is the case for the appointment of a receiver by this court aided by the leave granted to complainants by a judge of the court, wherein the other suit is pending, to sue the receiver appointed in such other suit. It is clear the leave given did not contemplate such a proceeding as the removal of that receiver by this court. No court or judge would be authorized to grant such a leave *ex parte*, and thus dispose of valuable rights and advantages of other parties, without at least giving them their day in court.

There are no averments in the bill which would justify the court which appointed Lane receiver in removing him from his trust. And no matter what showing the complainants may be able to make as to the incompetency, unfitness, or dishonesty of the receiver, this court cannot act. That showing must be made to the court which appointed him, and it must be asked to remove him. If these complainants are not satisfied with the manner in which the suit and proceedings of *Strang v. The Railroad Co.* are conducted in the United States circuit court for the southern district of Alabama, they must become, if they can, parties to that suit, and make their complaints to that court. This court does not sit to revise or review the proceedings of that court. Any motion, therefore, to appoint a receiver in this case, while the property to be administered is in the possession of a receiver appointed by another court, must be overruled, and this court can entertain no motion to remove or otherwise interfere with a receiver appointed by another court.

I add a few words in regard to the relations which the two cases referred to bear to each other. That suit was commenced

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by the holders of second mortgage bonds. They did not see fit to make the holders of the first mortgage bonds parties, nor was it necessary for them to do so. Calvert on Parties, 13, 14; Story's Eq. Pl., § 193. They have the right to proceed to a decree and sell the mortgaged property, but the sale must necessarily be made subject to the lien of the first mortgage bonds. The holders of these bonds are not parties, and can only be made parties by service of process or voluntary appearance. No general notice calling on them to present their claims will make them parties or bind them. If they were represented in the case by trustees, then a notice calling upon them to present their bonds before the master would be binding. But they are in no way represented in that suit. Their rights cannot therefore be affected by any decree in that case. *Campbell v. The Railroad Co.*, 1 Woods, 368.

They have the same right to commence suit on this mortgage as the holders of second mortgage bonds have on theirs. But as the latter have commenced their suit first, and have first obtained possession of the mortgaged property, the suit of the first mortgage bondholders cannot be allowed to interfere with the suit of the second mortgage bondholders. They can only interfere by being admitted as parties in that suit.

When the suit of the second mortgage bondholders has ripened into a decree of sale and the property has been sold, the first mortgage holders may then proceed in their suit to subject the property again to sale to satisfy their lien. But not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it.

NORTHERN DISTRICT OF FLORIDA.

JACKSONVILLE, AT CHAMBERS, JULY, 1873.

JAMES E. SEARLES et al. vs. THE JACKSONVILLE, PENSACOLA &
MOBILE RAILROAD COMPANY et al.

1. A justice of the supreme court, prior to the "act to further the administration of justice," of June 1, 1872 (Rev. Stats., sec. 719), could grant an injunction at any place, in or out of the circuit in which the suit was instituted.
2. By the seventh section of that act, it is provided that no justice of the supreme court shall grant injunctions except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge.
3. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute as well as when they cannot hear it for any other cause; and the supreme court justice may hear the application at any place where he may be.
4. Where a first mortgage has been foreclosed, and a decree of sale made and execution issued accordingly, a second mortgagee, not made a party to the suit, cannot have an injunction to restrain the sale, as his rights are unaffected.
5. Such second mortgagee may, at any time, redeem the mortgaged premises by tendering the amount due on the first mortgage. If only interest were due, he might redeem by tendering the amount of such interest.
6. A complainant cannot be compelled to add new parties to his bill, if he chooses to take the responsibility of their not being made parties.
7. When a defendant does not reside in the state where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement, he cannot set it up afterwards.
8. The court will not appoint a receiver of property which is in the possession of a person not a party to the suit.
9. An injunction to prevent a sale under execution will not be granted to a person who was not a party to the decree, unless he can show that his rights will be directly affected by the sale. Thus, where property has been sold under a first mortgage by a statutory proceeding, and the purchasers fail to pay the price of sale, although they have obtained a deed for, and possession

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of the property, and a bill is filed on the vendor's lien to compel payment of the balance, and a decree is obtained to that effect, and execution issued, a second mortgagee cannot have an injunction to prevent the sale, his rights being extinguished by the statutory sale.

10. Effect of proceedings under the Florida internal improvement act of January 6, 1855.

IN EQUITY.

Heard upon application for injunction July 2, 1873, before BRADLEY, Circuit Justice, at chambers, in Washington, upon notice duly given.

Mr. A. D. Bassett, for the motion.

Mr. H. R. Jackson, *contra*.

BRADLEY, Circuit Justice. On the 2d of July, 1873, counsel for the parties in this case, E. C. Anderson and others, appeared before me at chambers in Washington, D. C., pursuant to a notice served on Mr. Jackson as solicitor of the said E. C. Anderson and others, complainants in another suit in this court, which notice was to the effect that the complainant had filed his bill, and would apply to me, as associate justice of the supreme court, for an injunction to stay the sale of the Pensacola & Georgia railroad, which had been levied on by the marshal and advertised for sale under a decree in the said suit of E. C. Anderson and others.

It was objected by the defendants' counsel that the motion could not be entertained at this place by reason of the express prohibition contained in the seventh section of the "act to further the administration of justice," approved June 1, 1872. By the proviso of the section referred to, it is declared that no justice of the supreme court shall hear or allow any application for an injunction or restraining order, except within the circuit to which he is allotted, or at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit or the district judge of the district. The complainants met the objection by alleging that the application could not be heard by the circuit or district judge; that the district judge was in New Jer-

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sey, too ill to go to Florida to hear it, and that the circuit judge had left the circuit and could not be communicated with. Sufficient evidence of the district judge's illness and absence was laid before me, and I was satisfied from correspondence with the circuit judge that he had left the circuit, and could not be communicated with. But the counsel for the defendants contended that the disability on the part of the circuit and district judges to hear the application, intended by the statute, was something more than absence or sickness; that it meant an interest in the cause, or some other ground of disqualification by which they were incapacitated to hear the application. On reflection, I think that this would be too narrow a construction; that the convenience of suitors and the exigencies of justice require a liberal construction of the clause, such as would enable parties to apply to a judge of the supreme court when, for any reason, they cannot present their application to the circuit judge nor to the district judge. The object of the exception in the proviso is to prevent a failure of justice; and such a failure would as effectually ensue when the inability of the local judges to hear the application arose from one cause as when it arose from another. It is literally true that they cannot hear such applications when outside of their circuits; whereas, the supreme court judges can hear them anywhere in the United States, or, at least, could do so prior to this statute; and the question is, how far the statute prevents them from doing so now. I think it does not prevent them where the parties cannot, for any cause, present their application to the circuit nor to the district judge. I feel bound, therefore, to entertain the application.*

* The following are notes of an opinion prepared by Mr. Circuit Justice BRADLEY, in another case, prior to the act of 1872, on the power of a justice of the supreme court to hear an application for an injunction outside of the limits of his circuit. [REP.]

"On this question I never had any doubt. It is to be considered irrespective of the recent creation of circuit judges, and as matters stood when the courts were originally organized. The general jurisdiction of the justices of the supreme court was then regarded as coextensive with the territory of the United States. Prior to the act of April 29, 1802, there was no allotment of justices to particular circuits. They held the several circuits in rotation, and, at first, two justices went the circuit together. All of them were, in law, judges of all the circuit courts.

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But it seems to me that, in this case, there is no ground whatever for an injunction. The defendant E. C. Anderson, and others, held certain first mortgage bonds of the railroad company. The property was sold under the lien of these bonds by virtue of a statutory proceeding, and the purchasers failed to pay the whole of the purchase money. Anderson and others filed a bill to compel payment and set up the equity of the vendor's lien for a resale of the property. A decree was had and execution issued for this purpose. The complainant holds a number of the second

The mere circumstance of allotment could not affect their general powers, at least as regards cases in their own circuits.

"As the circuit courts were courts of equity as well as of law, the issuing of injunctions was part of their jurisdiction, and these must often have been issued, and other *ex parte* orders made in vacation. The justices of the supreme court must have exercised these powers. But it was impossible that there should have been such justices always present in every circuit, much less in every district. Twice a year, at least, they were required to hold sessions of the supreme court at the seat of government; and consequently, they could then be only in one district of the whole thirteen. And absence from a district would have been no less effectual than absence from the circuit in depriving them of jurisdiction over a case pending in the district; for the circuit courts are courts in and for particular districts, and not for the whole circuit.

"Orders in course were undoubtedly made by the district judges as assistant judges of the circuit courts; but those judges were not authorized to issue injunctions in said courts until the passage of the act of February 13, 1807. As a matter of necessity, therefore, the justices of the supreme court must have issued injunctions outside of the territorial jurisdictions of the circuit courts in which the cases were pending, unless we adopt the improbable conclusion that they transacted no chamber business in equity whatever, except when they happened to be actually present in the particular district as well as the particular circuit in which the case was pending.

"It is true that the 14th section of the judiciary act, in conferring express power to issue writs, confers it upon the courts and not upon the judges; but, under proper circumstances, the judges exercise the power as incidental to their office. It is the power of the court which they, as its officers, exercise, in the only way in which the power can be exercised in vacation.

"But whatever doubt may have ever existed on the subject was put at rest by the act of March 2, 1793, sec. 5, which expressly declared that writs of *ne exeat* and of injunction might be granted by any judge of the supreme court in cases where they might be granted by the supreme or circuit courts; but that no writ should be granted to stay proceedings in any court of a state, nor in any case without reasonable notice to the adverse party, or his attorney, of the time and place of moving for the same. Under this law the justices have ever since continued to act, and very little practical inconvenience has ensued."

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mortgage bonds of the same company, and was not made a party to the suit of Anderson & Co. He filed this bill for an injunction to prohibit the sale. But as he was not a party to the Anderson suit, he cannot be injured by the decree or sale therein. One of his allegations is that the principal of the first mortgage bonds is not due, and that the holders of the second mortgage bonds, as next incumbrancers, ought to have the privilege of redeeming the property, and getting possession of the same, by paying the arrears of interest. But he made no offer to redeem and nothing can be claimed on this ground. The complainant makes various charges of fraud against persons dealing with the property of the company and with its bonds; but he does not show that E. C. Anderson and others who obtained the decree in the former case have been guilty of fraud, or that they are demanding anything but their honest due.

I cannot see any ground for an injunction as prayed, nor how the complainant can be injured by a sale under a decree to which he or those whom he represents were not parties.

Application denied.

The above case came on again before BRADLEY, Circuit Justice, September 25, 1873, on an amended bill and further affidavits and answers of the defendants, and an injunction was applied for.

Mr. Jackson moved that the Florida Central Railroad Company be made a party to the suit. This motion, being objected to by the counsel for the complainant, was denied; the circuit justice holding that a complainant cannot be compelled to add parties to his bill, if he choose to take the responsibility of their not being parties.

Mr. Davis, filed a plea in abatement for Holland, one of the defendants, on the ground that he was not a citizen of Florida, when the bill was filed, and was not then a citizen of Florida, but a citizen of Georgia. This plea was allowed, the circuit justice holding that by the 11th section of the judiciary act, which confers jurisdiction upon the circuit court in cases between citizens of different states, the said jurisdiction was limited to suits between a citizen of the state where the suit is brought and a

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citizen of another state, and that no subsequent statute had enlarged this branch of jurisdiction; but that when a defendant, being served with process or appearing in a suit, fails to plead the matter in abatement, he cannot set it up at a subsequent stage of the proceedings, if all proper jurisdictional allegations are made in the bill or declaration; that the act of 1839 (Rev. Stats., sec. 737), allowing publication in proceedings on liens against specific property, only put the case in the same condition as if the absent defendant had appeared, but in no better condition.

It appeared from the pleadings and evidence, that D. P. Holland was in possession of the railroad in controversy as purchaser under a judgment in his own favor rendered in this court. As he pleaded in abatement and was no longer a party defendant in the suit, the circuit justice held that no receiver could be appointed to oust his possession. The application for the appointment of a receiver, therefore, was overruled. The circuit justice further held that unless the hearing was had by consent of the parties, he would not appoint a receiver at his chambers in Washington except as incidental to the granting of an injunction; that when parties in possession are enjoined from further intermeddling with property, the appointment of a receiver was often necessary to take care of and preserve it, and such appointment would be made as incidental to the injunction.

Mr. W. Call, for the motion for injunction.

Messrs. H. R. Jackson, J. P. C. Emmons, T. W. Brevard, W. G. M. Davis and H. Bisbee Jr., contra.

BRADLEY, Circuit Justice. The only question remaining is, whether an injunction should issue to prevent a sale by the marshal under the decree and execution of E. C. Anderson & Co. That decree was based on first mortgage bonds; the complainant holds and represents second mortgage bonds, and was not, nor was any other person representing the latter bonds, made a party to Anderson's suit. This suit, however, was not a foreclosure suit. The circumstances were peculiar and somewhat complicated. The first mortgage bonds had been issued under the internal improvement act of the state of Florida, passed January

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6, 1855, and had been guarantied by the governor and other state officers as trustees of said fund under said act. By the 3d section of the act, it was provided that all railroad bonds issued under it should be a first lien on the railroad, its equipment and franchise, and on failure of the railroad company to provide and pay the interest, and one per cent. per annum for sinking fund, it should be the duty of the trustees, after thirty days from default, to take possession of the road and property, and advertise and sell it to the highest bidder, and apply the proceeds to purchasing and canceling outstanding bonds of the company, or incorporate them with the sinking fund.

Such a seizure and sale of the railroad and property in question was made by the trustees on the 20th of March, 1869, and the amount of sale was sufficient to retire the bonds of the company, and about a million of dollars of the bonds were retired. But the purchasers, whilst managing to get a deed for the property, evaded or failed to pay more than four hundred thousand dollars of the purchase money, and the bonds of E. C. Anderson & Co. to that amount were never paid. Their bill was filed, therefore, on the equity of the vendor's lien, against the present holders of the property (who had organized as the Jacksonville, Pensacola & Mobile Railroad Company, and were charged with notice), and against the trustees of the internal improvement fund, to compel payment of the balance of the purchase money out of the property purchased, and to procure a decree for its appropriation to the payment of these unpaid bonds. The bill of Anderson & Co. did not repudiate the sale made by the trustees, but affirmed it, and sought to recover and appropriate the balance of the proceeds arising, or that ought to have arisen from that sale.

It is apparent from this statement, that if the sale made by the trustees was valid, the second mortgage bondholders, and all other parties holding interests subsequent to the first mortgage bonds, had no longer any interest whatever in the property. The sale under the statute made a clean and absolute title except as against the vendor's lien.

It is contended that the sale was illegal, because the road was not completed; and by the 12th section of the internal improve-

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ment act, until the road is completed, no payments are due on the sinking fund, and no delinquency for that cause can occur. But, although the road had not been constructed on the entire length of line or route projected and authorized by its charter, yet the company had stopped construction at Quincy, and the road seems to have been mutually regarded by the company and the trustees as a completed road to that point. Besides, the interest was largely in arrear, and the trustees had advanced interest to a considerable amount. There is no sufficient proof before me to show that the sale was prematurely made by the trustees, and I should be very unwilling to decide that point on a preliminary hearing. I do not think that a sufficient case is made by the complainant to justify me in granting the injunction sought. The motion is denied with costs.

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& MOBILE RAILROAD COMPANY et al.

1. Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings, or any other cause. The remedy is by original bill. The exceptions noted.
2. Persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition or motion.
3. Parties who have withdrawn their answer, and consented to a decree cannot afterwards ask to have proceedings on the decree suspended.
4. A consent decree was entered upon the basis of a certain agreement between the parties, by which execution was to be suspended upon certain terms. These terms not being complied with, the execution may be enforced.
5. Petition for a stay of proceedings on execution by persons not parties to the suit, and by other persons who consented to the decree, upon condition that proceedings upon it should be suspended upon certain terms — which were not complied with — dismissed.

Mr. A. S. Sullivan, on behalf of petitioners.

Mr. H. R. Jackson, on behalf of complainants.

BRADLEY, Circuit Justice. On the 2d day of July, 1873, a petition was presented to me at chambers in Washington, D. C.,

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by Mr. Sullivan, on behalf of the state of Florida, the trustees of the internal improvement fund of the state of Florida, the Jacksonville, Pensacola & Mobile Railroad Co., and Milton S. Littlefield, praying for a stay of the sale of the road and franchises of said company, advertised by the marshal to be made on the 7th of July inst., under the decree and decretal orders heretofore rendered in this suit.

Mr. Jackson, for the complainants, objected to the application being heard, first, on the ground that a justice of the supreme court is prohibited by the 7th section of the "act to further the administration of justice," approved June 1, 1872, from entertaining an application for an injunction or for a restraining order out of his circuit; secondly, that the governor of the state, being made a defendant as one of the trustees of the improvement fund *ex officio*, pleaded to the jurisdiction of the court on the ground that a suit would not lie in this court against a state, and on that plea the complainants voluntarily dismissed the bill as to said governor, and in like manner dismissed the same as to the comptroller of the state — so that the state and the trustees of the internal improvement fund had expressly declined to be parties in the case, and had no standing to be heard therein; thirdly, if it should be decided to hear the application, the complainant desired to present affidavits to show that delay of the sale would be highly prejudicial to the complainants and the public.

The first point of objection I overruled for the reasons already stated in the case of *Searles v. The Railroad Co. et al.*, ante, p. 621. The second is of a more serious character. The objection, in substance, is this: that persons who are not parties to a suit, have no standing in court to enable them to file a petition in said suit. If they have occasion to ask any relief in relation to the matters involved in said suit, or to the proceedings therein, they must file an original bill. This is undoubtedly the general rule. Strangers to a cause cannot be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like. Daniel's Ch. Prac., 357, 1080; Jacob's Rep.,

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159; 1 Russ. & Myl., 69. Creditors who are allowed to prove debts, and persons belonging to a class on whose behalf a suit is brought, are regarded as *quasi* parties, and of course may have a standing in court. But in this case, the state of Florida and the trustees of the internal improvement fund, being strangers to the suit, and not occupying any such relation thereto at the present time as to entitle them to intervene, and therefore not being bound by what is decreed or done in the suit, they cannot be received or heard on petition for a stay of proceedings therein. It would be a source of great hardship if persons not parties were allowed thus to come in and interfere. I say nothing here of the expediency or in expediency of proceeding in the cause without making the trustees of the internal improvement fund parties, and without invoking the intervention of the state; that is a matter which more particularly concerns the plaintiffs; and if any failure to make proper parties should be found to render the proceedings of less value, they must abide the consequences.

The only manner in which the state or the trustees can interfere with the proceedings is by original bill. The allegation that they intend to file such a bill is not sufficient.

The other parties to the petition, namely, the Jacksonville, Pensacola & Mobile Railroad Company and M. S. Littlefield, are parties to the suit, and to them the above objection does not apply. They are capable of filing a petition in the cause, and if the case were a proper one for the interference of the court, perhaps the petition might be amended by striking out the names of their copetitioners. But the case made by the petition, and the admitted facts, are not sufficient, as it seems to me, to authorize an interference with the proceedings.

The railroad company and Littlefield cannot now ask for any alteration of the decree. They virtually consented to its terms, and withdrew all defense which they had set up in the cause. They have applied for a rehearing, and it has been denied after full argument. The decree, as above said, was essentially a consent decree. It was made upon terms, and those terms were fully expressed in an agreement between the parties, dated the 20th of December last. By that agreement the complainants were to discontinue certain other suits — one in the state court

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of chancery in Jefferson county, Florida, in which a receiver had been appointed, and one in this court, sitting at Tallahassee — and were not to press execution on the decree if the defendants made the payments next referred to. The defendants were to pay ten thousand dollars within thirty days from the date of the agreement, and ten thousand dollars every thirty days thereafter until the whole debt was paid and satisfied; and if default was made, the complainants were to wait ninety days after such default before making seizure and sale of the property.

The defendants, the railroad company and Littlefield, if they have any ground at all for a stay of proceedings, must found it upon this agreement. They allege that the complainants, through the marshal, are proceeding to a sale of the property against the equity of their agreement. The facts seem to be that the complainants complied with the agreement on their part, by discontinuing the suits referred to; but that the defendants did not pay the first installment of ten thousand dollars until the 15th of February (whereas it should have been paid on the 19th of January), and have not paid any of the other installments. The defendants say that the complainants consented to the delay of the first installment, not having themselves discontinued their suits immediately, and thereby having delayed the defendants in obtaining possession of the property. The complainants admit that they accepted the first payment, but insist that they did not waive the payment of the succeeding installments. This is not controverted, and I do not see, therefore, what ground of equity the defendants have for staying the proceedings for sale. The second installment was due on the 18th of February, and the others at successive intervals of thirty days thereafter, and none of them were paid. The ninety days' indulgence which the complainants agreed to give expired on the 19th of May. The sale was advertised for the 7th of July.

But the defendants do not even tender or offer to pay the installments which have fallen due. The petition is not based on any such ground as that of a desire or willingness to comply with the substance of the agreement. It is based rather on alleged equities of the state, and on the charge that the complainants have violated the agreement made on December 20th last.

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Being of opinion that the complainants, as against the said defendants, have a right to proceed with the execution and sale, and that the defendants have shown no good reason for restraining them, I must deny the application for injunction.

PENSACOLA, MARCH TERM, 1875.

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1. Where an act of the legislature authorized the mayor and aldermen of a city, "with the consent of a majority of the corporation comprising said city," to subscribe money to any railroad leading from the city, and to borrow money to pay the same: *Held*, that there was thereby conferred upon the municipal officers power to issue bonds to pay the subscription.
2. Under authority of such a law, the mayor and aldermen of the city of Pensacola subscribed a large sum to aid the construction of a railroad from the city of Pensacola, and, in payment thereof, issued negotiable bonds payable to bearer in twenty years, which, on their face, stated that they were issued in conformity with the law. In a suit brought by an innocent holder for value on the coupons belonging to said bonds, it was *held* to be no defense to the action; that at the election to obtain the "consent of a majority of the corporation comprising said city" to such subscription, only a minority of the citizens voted; nor that the question submitted to the citizens was whether the subscription should be made to construct a railroad from Pensacola to Montgomery, and the subscription was actually made to construct a railroad from Pensacola to the state line.
3. A construction of a law which would impute to the legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided, if it can be fairly and reasonably done.
4. This rule applied to the acts of the legislature of Florida providing for the incorporation of cities and towns, approved August 6, 1868, and February 4, 1869.
5. It is not within the power of a legislature, by a repeal of the charter of a municipal corporation, to invade the rights of its creditors and cancel its indebtedness. Such legislation impairs the obligation of contracts and is unconstitutional.

This cause was heard upon demurrer to the pleas.

The action was brought to recover the amount due on a large

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number of interest coupons attached to bonds issued by the city of Pensacola. The following is a copy of one of the bonds:

"Issued in conformity with the 2d section of an act amendatory of an act to amend the act incorporating the city of Pensacola, passed by the legislature of the state, December 29, 1852, and approved by the governor, January 3, 1853.

"CITY OF PENSACOLA, STATE OF FLORIDA. Know all men by these presents, that the city of Pensacola is indebted to the Alabama & Florida Railroad Company of Florida, or bearer, in the sum of five hundred dollars; which sum, the said city engages to pay in current money of the United States at the office of the city treasurer, to the said Alabama & Florida Railroad Company of Florida, or bearer, in twenty years from the date hereof, with interest at the rate of seven per cent. per annum, payable semiannually on the first day of July and the first day of January in each year, on the delivery of the interest coupons attached, in the city of New York, at such bank as the treasurer of the city of Pensacola shall direct.

"Pensacola, January 1, 1858.

"FRANCIS B. BOBÉ, Mayor.

"F. E. DE LA RUA, Treasurer."

The following is a copy of one of the coupons sued on:

"\$17.50. CITY OF PENSACOLA. \$17.50.

"City Bond No. 38, for \$500. Interest coupon for seventeen $\frac{1}{100}$ dollars, due in New York, July 1, 1872.

"No. 29. F. E. DE LA RUA, Treasurer."

The other bonds are of the same tenor save as to letter and number; and the coupons, save as to number and date of payment.

The plaintiff averred that, as the administrator of Willis J. Milner, he was the owner and bearer of one hundred and eight of these bonds, and of interest coupons cut therefrom and past maturity, which amounted to \$36,662.50, and for this amount he asked judgment.

The second section of the act, approved January 3, 1853, referred to upon the face of the bonds as the authority for their issue, is as follows:

"Sec. 2. Be it further enacted, That the mayor and board of

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aldermen of the city of Pensacola, with the consent of a majority of the corporation composing said city, be and they are hereby authorized to subscribe in the name of the city of Pensacola any amount of money which they may deem necessary to any plank-road or railroad leading from the city of Pensacola; and for the purpose of procuring the amount of subscription, the said city of Pensacola shall have power to borrow the same and shall have power to impose a tax on real estate in said city at a rate not exceeding two per centum on the assessed value of such property."

Pensacola was incorporated as a town by a special but public act of the legislature, passed in 1839. By another special act, passed in 1856, it was incorporated as the city of Pensacola. Prior to the adoption of the constitution of 1868, all the cities and towns of the state were incorporated by special act.

The constitution of 1868 provided (art. IV, sec. 21) that "The legislature shall establish a uniform system of county, township and municipal government."

To carry out, as it is presumed, this provision of the constitution, an act was passed by the legislature, and approved August 6, 1868, entitled "An act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state."

This act provided that the male inhabitants of any hamlet, village, or town in the state, not less than one hundred in number, might establish for themselves a municipal government, with corporate powers and privileges under the provisions of the act.

It then proceeded to declare how such municipal governments might be organized, and what should be their powers and liabilities; in short, to provide for a general system of municipal government.

Section 30 of the act was as follows: "That all the powers and privileges conferred in and by this act may be exercised by any city or town within the limits of this state heretofore incorporated; and it shall be lawful for any previously incorporated city or town to reorganize their municipal government under the provisions thereof by a voluntary surrender of their charters and privileges, and by an organization under this act; and upon a

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failure on the part of any incorporated town or city to accept the provisions of this act within six months after its approval, all the acts vesting such city or town with power are hereby repealed."

Afterwards the legislature passed an act, which was approved February 4, 1869, having the same title as the act just referred to, and having in view the same general purpose. The 30th section of this act is identical with the 30th section of the act of August 6, 1868, save that nine months instead of six months were prescribed as the time within which cities and towns were to accept the provisions of the act; and in default of which, all acts vesting such city or town with corporate power were repealed.

The act approved February 4, 1869, repealed the act of August 6, 1868.

It appears from the pleas that the city of Pensacola, within six months after the passage of the act of 1868, surrendered its original charter and privileges, and reorganized its municipal government under that act. But that city failed to surrender its charter and privileges within nine months after the approval of the act of 1869, and to reorganize under that act, but that the same city of Pensacola with the same territorial limits, immediately after the expiration of said nine months, organized under the provisions of the first six sections of the act of 1869, which prescribe how the inhabitants of any hamlet, village, or town in the state, not less than fifty in number, may establish for themselves a municipal government.

On the 3d of February, 1870, the following act of the legislature was approved and became a law:

"AN ACT RELATING TO CITIES. — Whereas, the legislature of this state, by the passage of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved February 4, 1869, did not intend said act to affect the organization of any city or town made under or by virtue of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved August 4, 1868; therefore

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"The people of the state of Florida, represented in senate and assembly, do enact as follows:

"Section 1. That all acts, doings, and proceedings made and had, or hereafter to be made and had, by any mayor, board of councilmen, or any other city officer in any city of this state, organized in pursuance of an act entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this state, approved August 4, 1868, and while in the performance of their duties under said organization, are hereby declared legal and valid."

Messrs. H. A. Herbert and E. A. Perry, for plaintiff.

Messrs. A. E. Maxwell and G. A. Stanley, for defendant.

Woods, Circuit Judge. The defendant pleads the general issue and six special pleas, which, however, set up but two substantial defenses to the action.

The first of these special defenses is in effect as follows: That the authority to incur the indebtedness for which the bonds were issued was dependent upon the consent of a majority of the corporation composing said city, and that at the election held to decide whether the city would incur said indebtedness, only ninety-five votes were cast, which was not a majority of said corporation; and the question submitted to the voters was whether the city should subscribe to the stock of a railroad leading from Pensacola to Montgomery, in the state of Alabama, and not to a railroad leading from Pensacola to the Alabama state line.

The plea which sets up this defense fails to present one of the questions which the pleader intended to present, by neglecting to aver that the subscription of stock was actually made in a company which was only authorized to build, and only did build a railroad from Pensacola to the Alabama state line. We will, however, consider the plea as if such averment were made.

The evident meaning of the second section of the act approved January 3, 1853, above quoted, is that the city of Pensacola may, upon a condition therein named, subscribe to the capital stock of any plankroad or railroad leading from the city of Pensacola, and may borrow the money to pay the amount of its subscription, and may levy a tax on the real estate of the city to pay the sum so borrowed, principal and interest.

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The authority given by this enactment is ample to cover the acts done by the mayor and aldermen of the city. They subscribed the stock in a railroad leading from Pensacola, and, to raise the money to pay for it, issued the bonds, a portion of which are in controversy in this action.

The power to borrow money conferred upon a municipal corporation implies the power to issue bonds and interest coupons on which to negotiate the loan. *Rogers v. Burlington*, 3 Wall., 654.

But the defendant insists that a majority of the voters of the city did not vote for the subscription of money to the railroad, and that the railroad in behalf of which the vote was taken was a road leading from Pensacola to Montgomery, and not a road from Pensacola to the Alabama state line.

Do these facts constitute a defense to these bonds and coupons in the hands of a *bona fide* holder?

The authorities are adverse.

"When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper." See *Gelpcke v. Dubuque* 1 Wall., 203, and numerous cases there cited. See also *Moran v. Miami Co.*, 2 Black, 722; *Mercer Co. v. Hackett*, 1 Wall., 83; *Van Hook v. Madison City*, id., 291; *Meyer v. Muscatine*, id., 384; *Mygatt v. City of Green Bay*, 8 Am. L. R., 271; *Seeling v. City of Racine*, id., 603; *Supervisors v. Schenck*, 5 Wall., 772.

In the case of *Commissioners of Knox Co. v. Aspinwall*, 21 How., 545, it was held that "when the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the board of commissioners may not be conclusive in a direct proceeding to inquire into the facts before the rights and interests of other parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

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The case of *Marsh v. Fulton Co.*, 10 Wall., 676, is relied on to support the defense under consideration.

All that was decided in that case was, that where the commissioners of a county are authorized to subscribe to the capital stock of a particular corporate body, that does not authorize a subscription to the stock of another corporation, and that the bonds issued to pay for such stock are issued without authority, and are therefore void. That is not this case. Here the city was authorized to subscribe to any plankroad or railroad leading from the city of Pensacola. The pleas show that the subscription was made to such a railroad. The subscription was therefore covered by the authority of the law. If there was any informality in the election by which the consent of the citizens of Pensacola was to be obtained to the subscription, that brings the case precisely within the authorities above cited.

I am of opinion, therefore, that the defense under consideration is no answer to the action.

The defense mainly relied on is the second.

This may be thus stated: After the bonds and coupons named in the declaration were issued by the city of Pensacola, the charter under which it was organized was repealed, and the municipal body known as the city of Pensacola ceased to exist, and the present city of Pensacola was organized under another law, and is a distinct and different municipal corporation from that which issued the bonds. Therefore, the present city of Pensacola is not liable on these bonds and coupons.

In other words, it is claimed that the city of Pensacola, as a municipal corporation, ceased to exist, by its failure to adopt the provisions of the act of February 4, 1869, within nine months after the approval of that act; that as a consequence, all the debts and obligations incurred by the city prior to February 4, 1869, were canceled and destroyed; and that the present city of Pensacola having been organized under the act of 1869, though by the same inhabitants, and covering the same territory, and with substantially the same powers, is relieved of any obligation to pay the debts of the city incurred prior to February 4, 1869.

The legislation which produces such effects ought to be clear and explicit. To ascribe a purpose to accomplish such results,

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to the legislature of Florida, would be to charge it with an attempt to perpetrate a most unconscionable and barefaced fraud.

I do not believe that the legislature of Florida had any such purpose, or that its legislation, fairly construed, can have any such result. A construction of the law which sustains such a purpose ought to be avoided, if it can be fairly and reasonably done, consistently with the terms of the act.

A careful reading of the acts of 1868 and 1869 shows that the purpose of those acts was not to destroy the municipal corporations already existing in the state, but to carry out the requirement of the constitution by establishing a uniform system of municipal government in the state, and to rehabilitate the existing municipal bodies with new and uniform privileges and powers.

The language of section thirty of both the acts carries this idea: "All the powers and privileges conferred in and by this act may be exercised by any city or town within the limits of this state heretofore incorporated." Had the section stopped here, there could be no pretense that its effect was to create new corporate entities. But it proceeds to declare that "it shall be lawful for any previously incorporated city or town to reorganize their municipal government under the provisions thereof, by a voluntary surrender of their charters and privileges, and by an organization under this act."

This clause provides for the "reorganization," not the destruction, of municipal corporations. It does not provide for a new corporate entity. If it did, it would follow that every time a city or town received a new charter, it became a new corporate body, which is not the case. *Colchester v. Seaber*, 3 Burr., 1866. The language of the section thus far seems to recognize the continued and unbroken life of the cities and towns reorganized under the act.

The last clause of the section which, upon a failure of an incorporated town or city to accept the provisions of the act within nine months, repeals the acts vesting such city or town with corporate powers, does not necessarily destroy the corporate existence of such city or town.

Dillon, in his learned work on municipal corporations, says

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(vol. 1, sec. 116): "Where the functions of an old corporation are suspended, or where the corporation by loss of all its members, or of an integral part, is dissolved as to certain purposes, it may be revived by a new charter, and the rights of the old corporation granted over to the same or a new set of corporators, who in such case take all the rights and are subject to all the liabilities of the old corporation of which it is but a continuation."

The text is sustained by the citation of the following, among other authorities: *Rex v. Passmore*, 3 Term, 119, 247; *Regina v. Bewdley*, 1 P. Wms., 207; *Colchester v. Brooke*, 7 Q. B., 383.

My construction of the latter part of section 30 is, that it provided merely for a suspension of the powers of the municipal corporations failing to reorganize under the act, and not for a dissolution of the corporation itself.

As soon therefore as the city of Pensacola organized under the first six sections of the act, it was simply the assumption by the city of the new powers and privileges which the act conferred, and was not the creation of a new corporation.

That it was not the purpose of the legislature to give the effect to the act of 1869, claimed by defendant, is apparent from the enactment of the legislature of Florida, approved February 3, 1870, entitled "an act relating to cities," and copied at large in the statement of the case.

I am of opinion, therefore, that the failure of the city to reorganize under the act of 1869, within nine months after its passage, did not put an end to the corporate existence of the city of Pensacola, and that its subsequent reorganization under the first six sections of the act did not create a new, but was merely the rehabilitation of an old corporate body.

But conceding that the effect of the acts of August 6, 1868, and February 4, 1869, and of the failure of the city of Pensacola to reorganize under the latter act, was what the defendant claims, and that it was the purpose of the legislature to accomplish that result, the question remains, Was it competent for the legislature to destroy a municipal corporation, or to put it in its power to destroy itself, so as to cancel and wipe out its debts and liabilities?

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It was held by Judge STORY, in *Mumma v. Potomac Company*, 8 Pet., 281, that a private corporation might be dissolved by the legislature, or by judicial sentence, and that such dissolution did not impair the obligation of a contract any more than the death of an individual impairs the obligation of his contract. He placed this view on two grounds: (1) Because the obligation survives and the creditors may enforce their claims against any property belonging to the corporation; and (2) Because every creditor is presumed to contract with reference to the possibility of the dissolution of the corporate body.

The case is different with a municipal corporation. The main, and in most cases the only source from which creditors of a municipal corporation can expect to receive payment of their claims is found in the power of taxation. The dissolution of the corporation of course puts an end to its power of taxation, and renders the collection of debts owing by it an impossibility.

Now, in the case of these bonds, the act which authorized the indebtedness for which they were issued also provided for the levy of a tax to pay the indebtedness.

That provision for taxation was as much a part of the contract between the city of Pensacola and the bondholder as if it had been inserted in the body of the bond. A repeal of the tax provision would have impaired the obligation of the contract, and would have been a violation of the constitution of the United States.

In the case of *Von Hoffman v. Quincy*, 4 Wall., 535, the result of the decision of the court was, that when a statute authorized a municipal corporation to issue bonds and to exercise the power of local taxation to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the constitution, and cannot be withdrawn until the contract is satisfied.

The state and the corporation in such cases are equally bound. See, also, *Butz v. Muscatine*, 8 Wall., 583; *Welch v. St. Genevieve*, 1 Dill., 134; *Lansing v. County Treasurer*, id., 522.

If the legislature cannot take from a municipal corporation the power of taxation conferred contemporaneously with the power to borrow money, and for the purpose of repaying the money

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borrowed, it would seem to follow *a fortiori* that it could not utterly destroy the municipal corporation which had issued bonds on the faith of a law authorizing taxation to pay them; thus, not only repealing the power of taxation, but leaving no corporate entity in existence against which suit might be brought.

How the obligation of a contract, made by a municipal corporation for the payment of money, could be more effectually impaired, it is difficult to conceive.

Upon this question, Dillon, in his work on Municipal Corporations, vol. 1, sec. 114, says: "As respects creditors of a municipal corporation, their rights are protected from legislative invasion by the constitution of the United States, and no repeal of a charter of a municipal corporation can so dissolve it as to impair the obligation of the contract, or, it may probably be safely added, preclude the creditor from recovering his debt."

In support of this view the learned author cites the following authorities: Cooley Con. Lim., 290, 292; *Curran v. Arkansas*, 15 How., 312; *Thompson v. Lee County*, 3 Wall., 327; *Havemeyer v. Iowa County*, id., 294; 2 Kent, 307, note; *County Commissioners v. Cox*, 6 Ind., 403; *Coulter v. Robertson*, 24 Miss., 278; *Soutter v. Madison*, 15 Wis., 30; *Blake v. Railroad Co.*, 39 N. H., 435.

My conclusion is, therefore, that no legislation of the state of Florida could so destroy the city of Pensacola as to relieve it from the obligation to pay the bonds issued by it; that the present city of Pensacola is the same corporate body as that by which the bonds were issued, reorganized and clothed with a new charter, and with new powers and privileges, it is true, but still the same municipal corporation, and liable to pay the bonds and coupons in controversy in this suit.

Any other conclusion would produce the most monstrous results.

It would put it in the power of every city and town in Florida to cancel all its indebtedness incurred prior to February 4, 1869, amounting to many hundred thousand dollars, and to set their creditors at defiance. It would enable every city which receives a new charter to repudiate all indebtedness contracted under its

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old one, and leave the holders of its bonds utterly without remedy.

In my judgment, neither of the defenses set up by the special pleas is good in law.

The demurrer to the pleas must, therefore, be sustained.

**THE PENSACOLA TELEGRAPH COMPANY VS. THE WESTERN UNION
TELEGRAPH COMPANY.**

1. The section of an act of a state legislature which purported to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the state, is in conflict with the act of congress approved July 22, 1866, entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes;" and the section conferring such exclusive right is therefore null and void.
2. Congress has the constitutional power to pass an act giving to telegraph companies, organized under state laws, the right to construct and use lines of telegraph along any of the military or post roads of the United States.

This was a cause in equity which was submitted on the pleadings and evidence for final decree.

Messrs. Chas. W. Jones, R. L. Campbell, and G. A. Stanley,
for complainant.

Messrs. C. C. Yonge and E. A. Maxwell, for defendant.

WOODS, Circuit Judge. The bill avers in substance that on the 11th day of December, 1866, the legislature of the state of Florida passed an act by which it made the complainant company a body corporate, and conferred upon said company the sole and exclusive right and privilege of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa. That in pursuance of authority conferred by its act of incorporation, the said company had erected a line of telegraph along the right of way of the Alabama & Florida Railroad Company, within the county of Escambia, from Pensacola to the Alabama line, a distance of forty-seven miles.

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That by virtue of the pretended authority contained in an act of the legislature of Florida, approved February 18, 1874, the defendant company, disregarding the exclusive rights conferred upon complainant by its charter, is proceeding to erect in the county of Escambia, and along the identical railway route where the line of complainant is erected, a line of electric telegraph, and it is the purpose of defendant to use its line, when erected, for the transmission of telegraphic dispatches for hire. That the erection and use of said line will greatly impair the value of the line erected by complainant, and deprive it of the benefit of its exclusive privileges within the counties of Escambia and Santa Rosa, granted by the legislature of Florida.

The bill prays that defendant may be restrained from the erection and use of said line of telegraph within the county of Escambia in the state of Florida.

The answer admits that the defendant company is erecting a line of telegraph from Pensacola to the Alabama state line, all within the county of Escambia, in the state of Florida. It avers that the line will follow the right of way of the Louisville & Pensacola Railroad Company, from which it has obtained a license to erect its line upon said right of way, and it claims the right to erect and use its line for the purpose of transmitting messages by telegraph for hire, by virtue of authority granted by the legislature of Florida, and also by virtue of an act of congress, approved July 24, 1866. The answer avers that the defendant has filed with the post master general its written acceptance of the restrictions and obligations required by said act.

As in my judgment, the law of congress is sufficient authority for the acts of defendant, it will only be necessary, in deciding this case, to consider its provisions.

It is entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," and is found on pp. 221, 222, 14 Statutes at Large (Rev. Stat., title Telegraphs).

The first section declares that any telegraph company now organized, or which may hereafter be organized under the laws of any state of this Union shall have the right to construct, maintain and operate lines of telegraph * * * along any of the mil-

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itary, or post roads of the United States, which have been or may hereafter be declared such by act of congress.

Sec. 2 provides that telegraphic communications between the several departments of the government of the United States, and their officers and agents, shall, in their transmission over the lines of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the post master general.

The 3d section, among other things, provides that the United States may, at any time after the expiration of five years from the passage of the act for postal, military or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, to be appointed as is provided in said section.

The 4th and last section declares that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file its written acceptance with the post master general of the restrictions and obligations required by this act.

By an act of congress, approved June 8, 1872 (Rev. Stat., sec. 3964), all railroads are declared to be post roads.

This act of July 22, 1866, the provisions of which have just been stated, was, it will be observed, in force before the passage of the act of the legislature of Florida, incorporating the complainant, and giving it exclusive privileges.

The constitution of the United States, article V, declares, that "This constitution and the laws of the United States, which shall be made in pursuance thereof, * * shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary, notwithstanding."

If congress had power to pass this act, it would seem to follow, that the act of the legislature of Florida could not override it.

It will be observed, that the act contemplates the use of the telegraph lines for postal, military or other purposes; that it gives the business of the several departments and officers of the government the priority over all other business, and at rates to

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be prescribed by an officer of the government, and that it provides for the purchase, at an appraised value, by the government, if it shall so elect, of the lines of the companies which take advantage of the act, and the companies are required to assent to these conditions.

The power of congress to pass the act may be referred to the power to regulate commerce among the several states (*Gibbons v. Ogden*, 9 Wheat., 189-229), or it may be referred to the power to establish post offices and post roads, or to the power to raise and support armies, or to the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

The use of the electric telegraph by the departments and officers of the government has become absolutely necessary to the carrying on of the operations of the government. The functions of the government, either in war or peace, could not now be carried on without its use. The power, therefore, to secure its advantages must necessarily exist in congress.

It is not supposed, nor is it claimed by defendant, that the act of congress gives a telegraph company the right to occupy the right of way owned by railroad companies without compensation. The right of way of a railroad company is private property and cannot be taken for public or private use without compensation.

The main purpose and effect of the law is to prevent just such legislation by the states as that set up by the complainant in this case. If every state legislature should undertake to pass such charters as that granted to the Pensacola Telegraph Company, the operations of the general government, so far as they are carried on by the telegraph company, would be greatly impeded if not absolutely obstructed.

But it is claimed by the counsel for the Pensacola Telegraph Company, that it was not the purpose of the act of congress to authorize the telegraph companies of one state to erect telegraph lines along post roads within the limits of another state. It would seem to be a sufficient answer to this, that the act itself makes no such restriction. Its language is plain and unequivocal: "Any telegraph company now organized or which may hereafter be organized under the laws of any state of this union

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shall have the right to construct and operate lines of telegraph * * along any of the military or post roads of the United States which have been or may hereafter be declared such." Here is no such restriction as the complainant insists upon. Such a restriction, it is plain to see, would defeat the object of the act which is to provide telegraph lines all over the country, of which the government should have the priority of use at reduced rates, and which it may purchase at its option.

Upon the whole case, I am of opinion that so much of the act of the legislature of Florida, as purported to give the exclusive right to the complainant to erect and use lines of telegraph in the counties of Escambia and Santa Rosa was in conflict with the act of congress and, therefore, null and void.

These views coincide with the opinion expressed in the case of the *Western Union Telegraph Company v. The Atlantic & Pacific Telegraph Company*, 5 Nev., 102.

The result is, that the complainant has not shown itself entitled to the injunction prayed for by its bill.

The bill, must, therefore be dismissed at complainant's cost.
Decree accordingly.

JACKSONVILLE, AT CHAMBERS, MAY, 1875.

FRANCOIS VOSE vs. THE TRUSTEES OF THE INTERNAL IMPROVEMENT
FUND OF THE STATE OF FLORIDA et al.

1. Where the Trustees of the Internal Improvement Fund of Florida were restrained by the order of the court from selling or disposing of any lands belonging to their trust, except in strict accordance with the act of the legislature prescribing their duties, and the exercise of judgment and discretion was required on the part of the trustees as to the true construction of their powers and duties under the act, and they answered under oath that they had done no act which they believed or supposed was in violation of any direction of the court, but had in good faith tried to obey the decree of the court, a motion to attach them, as for a contempt for disobedience of the decree of the court, was overruled.

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2. Neither a petition, nor an order of the court, for a rehearing, of itself stops proceedings under the decree, unless the court so specifically directs.
3. An attorney for trustees charged with a public trust, or one of such trustees acting as attorney for the others, has not the implied power to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands.
4. Lands belonging to the public domain of a state which, by an act of the legislature, had been made a trust estate for the payment of certain bonds, and placed under the control of trustees appointed by law, were subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court could appoint its own agents to make sales thereof.
5. In such a case, the court has the power to compel the trustees who hold the legal title to execute conveyances for the lands sold by the agents of the court.

IN EQUITY.

On the 6th day of January, 1855, the legislature of Florida, by an act of that date, vested certain public lands, including all swamp and overflowed lands belonging to the state, in the governor, comptroller, treasurer, attorney general and register, as trustees, to constitute an internal improvement fund, and to serve amongst other things as a guaranty of bonds to be issued by certain designated railroad companies for the purchase of iron rails and rolling stock. A certificate of guaranty was to be placed on the bonds of the trustees. In case the interest on these bonds, and one per cent. per annum for a sinking fund, were not paid by any of the companies, the trustees were authorized to take possession of and sell the road, the appurtenances and franchises of the company in default, and to apply the proceeds in purchasing the bonds issued by the company, or incorporating them with the sinking fund.

The powers of the trustees were large and various. They were authorized to fix the prices of the lands, to make arrangements for draining them and to promote their settlement and cultivation by allowing preëmptions and other modes of encouragement.

The Florida Railroad Company was one of the companies included in the benefits of this act, and issued a large number of bonds, which were duly indorsed by the trustees. No install-

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ments of interest or sinking fund were paid during the war. In November, 1866, the trustees seized and sold the road, and, with the proceeds of sale, purchased and canceled a large proportion of the outstanding guaranteed bonds of the company. The complainant held a number of the bonds of the company which were not thus purchased. He filed his bill for relief against the trustees whom he charged with mismanagement of the trust funds, and against other parties and corporations whom he charged with complicity in such mismanagement by obtaining fraudulent purchases of the lands at nominal prices. He also prayed for an injunction and for the appointment of a receiver of the trust fund.

The court granted first an injunction, afterwards it appointed a receiver, and at a still later date it appointed three persons to act as agents for the trustees. The order of the court, allowing the injunction and making the appointments just stated, is fully set out in the opinion of the court which follows.

The case came on for hearing on a motion to attach the trustees for disobeying the injunction of the court, and also upon a petition for a rehearing of the order of the court appointing the said agents of the trustees.

Messrs. Henry R. Jackson and David S. Walker, for complainants.

Messrs. Wm. Archer Cocks, Attorney General of Florida, and *James M. Baker*, for defendants.

BRADLEY, Circuit Justice. The first motion in this case is made by the complainant, for an attachment against the individual trustees of the Internal Improvement Fund, as for a contempt, which motion is based upon the charge that said trustees have violated the injunctions and decrees heretofore made in the cause. The defendants (the trustees aforesaid) have answered the petition for an attachment, distinctly and positively denying any intention to violate any injunction or decree in the cause, and averring that they have not done so, but that, whatever their predecessors may have done, they, the present trustees, have been guided by the opinion of their counsel, with a firm endeavor to comply with every injunction decree and order binding on them.

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This is the substance and effect of their several answers — not the precise terms in which they are couched. But the complainant, in rebuttal of these answers, relies on certain undisputed facts, which he alleges to be clear violations of the injunctions on the part of the defendants.

The injunctions which the trustees are charged with violating are based on several orders of the court heretofore made. The first was issued by Circuit Judge Woods on the 6th of December, 1870, among other things, enjoining the then trustees and their successors from selling or donating or disposing of the land belonging to the trust, otherwise than in strict accordance with the provisions of the act of 1855, fixing the price and allowing ~~prescriptions~~ of the same in obedience to all the restrictions of the act; that they desist from selling said lands for scrip or state warrants of any kind, or for ~~ought~~ else than current money of the United States; that they desist from using or applying any of the moneys of the fund, except in applying them to the creation of the sinking fund under the act, or in payment of coupons, according as they properly belong to the one purpose or the other; and that they desist from paying the coupons in any other mode than in the order of their priority, fixed by the date of their coming to maturity, paying first such as first became due, and the others in the order in which they fell due; and that they desist from carrying out a certain agreement made with the Florida Improvement Company for the sale of one million one hundred thousand acres of land at ten cents an acre.

The second order relied on was made by District Judge FRAZER on the 1st of June, 1872, whereby a receiver was appointed to receive and hold all the moneys and securities belonging to the trust fund, and these trustees were required to pay to the said receiver all moneys in their possession or control, and to deliver to him all securities or evidences of indebtedness belonging to said fund, and to pay to him, from time to time, all moneys which might come into their hands from the sale of land or any other source whatsoever.

The third order or decree relied on is the decree made by Circuit Judge Woods, December 4, 1873, which authorized Marcellus A. Williams, Samuel A. Swan and Hugh A. Corley,

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the agents of the trustees for the sale of the lands of the Internal Improvement Fund, to sell said lands in such amounts and at such prices as would, in the exercise of their discretion, most rapidly procure the requisite means to discharge the indebtedness established by decree in the cause, and make the said agents responsible for all their acts in the exercise of this discretionary power, not simply to the trustees, but directly to the court, subject to injunction at any time by its order, and liable to punishment for contempt; and required the said agents to pay over to the trustees the money that might be received by them from sales, and to report the same to the receiver; and requiring the trustees to turn over the said moneys to said receiver monthly, with a monthly statement of account; the trustees to arrest the proceedings of the agents if, in their judgment, they were so exercising the powers vested in them as to jeopardize the interests of the state in the fund; it was also provided that all legitimate expenditures and compensation for services should be deducted by the agents from the moneys coming into their hands; and, in like manner, that all legitimate expenditures be retained by the trustees, before turning over the same to the receiver, subject, however, to exception and the approval of the court.

From this recital of the original injunction and the subsequent orders and decrees, it is apparent that it is somewhat difficult to define, except in a few specified particulars, what are the positive prohibitions imposed upon the trustees. That they are not to receive scrip or state warrants, or anything else than current money for the price of lands sold; that they are to apply the moneys of the fund only in aid of the sinking fund and payment of coupons; that they are to pay coupons only according to priority of maturity; and that they must pay to the receiver all moneys coming into their hands, after deducting necessary expenses, are directions sufficiently specific and clear; and these directions they insist that they have ever observed since their accession to the offices which they respectively hold. But the injunction not to sell or dispose of any lands belonging to the trust, otherwise than in strict accordance with the provisions of the act of 1855, is one which, in its very terms, involves the exercise of some judgment and discretion on the part of the trustees

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as to the true construction of their powers and duties under the act; and the implied duties which arise from the peculiar relation which they hold to the agents appointed to make sales of land are so inferential and uncertain that it is very difficult to designate any act or omission, which has been charged against them, as a violation of an order of the court.

It is charged that, in reference to the last decree, they have pursued an obstructive policy, first, in discharging the agents, as their agents, after they had been appointed agents by the court; second, in refusing to make deeds for lands sold by the agents; and, third, in refusing to give the agents scrip for small parcels of land called "floats," although they contracted with other parties to give them such scrip. But it is just to say, that no injunction or decretal order has ever been made prohibiting them from discharging their agents, or requiring them to do either of the other things specified. It may be implied that it was expected of them that they should give deeds for lands sold by the agents; but no such order has ever been made. And, on their part, they give their reasons for not giving such deeds; they did not approve the sales made by the agents. If it be alleged that no right of approval or disapproval was reserved to them, it may very plausibly be said that their control and supervision over the acts of the agents were expressly confirmed by the decree itself in the clause which authorized them to arrest the proceedings of the agents, if in their judgment they were so exercising their powers as to jeopardize the interests of the state in the fund. As the greater power usually includes the less, they contend that it was reasonable for them to suppose that they had the lesser power, which they had always exercised, of judging of the expediency of particular sales and contracts for sale. As the trustees expressly swear that they have not done anything in the matters complained of which they believed or supposed was violative of any direction of the court, but were ever solicitous of carrying out the object which the court, by its decrees, had in view, namely, the raising of money by sales of land to pay off and discharge the indebtedness of the fund, and have desired and now desire to comply with the directions of the court, we

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do not feel called upon to adjudge them in contempt upon the vague charge of pursuing an obstructive policy.

It is further charged, however, that they have committed certain specific acts, which amount to a contempt. These acts may be arranged in two classes: first, making contracts for large sales of land at inadequate prices, and not according to a scale of fixed prices as required by the act of 1855; secondly, paying moneys out for purposes contrary to those expressed in the original injunction. As to the first of these charges, it does appear that the trustees have made a contract with the Great Southern Railroad Company for a large sale of land, involving millions of acres, which would be void according to the decision of the supreme court of Florida, in the case of *The Trustees v. Bailey*, 10 Fla., 112. By the decision in that case, neither they nor the legislature itself have the right to appropriate any part of the internal improvement fund to the promotion of any other schemes of internal improvement than those mentioned in the act of 1855, until the bonds issued to carry out the system therein mentioned have been paid, or placed on a safe basis of payment, as prescribed by the act. The trustees say that the benefits to be derived from the construction of the proposed railroad will more than compensate for the low and merely nominal price at which they are to have alternate sections of land. But, according to the doctrine of that case, this makes no difference; they are not to be the judges; the existing debts must be first paid before new ones can be created. If this view should be adopted by this court, it may be good cause for setting aside the said contract; but as the trustees allege that they have acted in good faith, and with a view to the best interests of state, and of the internal improvement fund itself, we do not think that they can be convicted of a contempt of this court. The court has never made any order depriving the trustees of the power to sell and dispose of the lands, but only enjoining them to sell in accordance with the terms and provisions of the act of 1855. But the act gives them large discretion, and authorizes them to have in view the encouragement of immigration, the drainage of swamp land and the development of the

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resources of the state. If the contracts already made with the holders of existing outstanding bonds are such as to preclude the trustees from exercising this discretion in all its original largeness, there is still sufficient room for difference of opinion as to the extent of their remaining discretion, to divest their acts of the character of contempts of court, until the court shall have explicitly declared what they shall or shall not do. The other contracts referred to do not admit of as much question as the one which we have considered; and we do not think, therefore, that any attachment for contempt should issue for this cause.

As to the payments which the trustees have made for expenses and services of agents, salesmen, counsel, etc., their accounts are rendered monthly, according to a former decree, and are always subject to examination and exception, and may be allowed or disallowed by the court. The trustees contend that the expenses are all proper to be made, and there is no charge that they have not been actually made. They present no ground for attachment as for a contempt.

The motion for attachment must be overruled.

We next come to the motion by the trustees for a rehearing, upon a petition filed by them on the 12th day of January, 1874, during the term at which the decree of December 4, 1873, which they desire to be reheard, was made. It sufficiently appears that the petition was filed in due time, and properly signed by counsel, and that no opportunity has since occurred for arguing the motion for rehearing. It is, therefore, in order to be heard at this time.

The defendants insist that the petition itself, *proprio vigore*, suspended all proceedings on the decree. But this is not the law. Expressly the contrary is laid down in Dan. Ch. Pr., and other books. Daniel says: "It is an established rule that an order for a rehearing, or an appeal, does not stop the proceedings under the decree or order appealed from, without special order of the court." 2 Dan. Ch. Pr., 1547, 3d Am. ed. Hoffman says: "Neither the petition for rehearing, nor the order itself, stops the proceedings under a decree. A special order must be obtained on application." 1 Hoff. Ch. Pr., 565, note.

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On the other hand, the complainant insists that the decree was a consent decree, and a rehearing cannot be had thereon. The trustees, as soon as they heard of the decree, repudiated the authority of their attorney (Hon. W. A. Cocke), to enter into such a consent. It is insisted, however, that he, himself, being attorney general of the state, was one of the board of trustees, and occupying that position, had more than the usual authority of an employed attorney.

We have great hesitation in acceding to the proposition that an attorney, or that one of several trustees, acting as such, has implied power in any case to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. And in the case of a public trust, like the one in question, the reasons for hesitation are still stronger. After due consideration of the subject, we are of opinion, that no such implied power exists; and therefore, without at present going into the reasons for our conclusion, we adjudge and decide that the decree, in this case, is open for consideration.

The grounds alleged for a rehearing are mainly that the trustees are statutory trustees, *ex officio*, appointed by the law, and clothed with many duties of a public and political character; and that the appointment of other persons to execute said trusts is incompatible with the duties to be performed; and, secondly, that private persons cannot be appointed by the court to make judicial sales of land.

In answer to the first of these objections, it may be said that the agents appointed by the court to make sales of land were not invested with the general trusts imposed by the statute on the *ex officio* trustees; but only with the power to sell lands for the purpose of raising the moneys due to the parties decreed to have claims against the same. If the lands belonging to the internal improvement fund may be at all subjected to the payment of the bonds secured thereby; if they are in truth a trust fund, *inter alia*, for the payment of those bonds, they are subject to the power of a court of equity to raise therefrom the money due and chargeable thereon. The question then arises, How shall the court effect their sale for the purpose? Can it only require the

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trustees to make sales, or may it effect the sales by other agencies? Suppose the trustees refuse to act, is the court without power to authorize a sale by other modes? It seems to us clear, that the court may employ its own accustomed machinery for the purpose of raising the money to satisfy the liens on the fund. And we are of opinion that a court of equity may appoint commissioners, receivers, or special masters or agents, in its discretion, to effect such sales.

In our judgment, therefore, the appointment of the agents in question was neither illegal nor erroneous.

The difficulty arises from the want of power in the agents to give good conveyances for the lands sold. But the court certainly has power to compel those who hold the legal estate to execute the proper conveyances. The trustees can be ordered to execute the necessary deeds.

But as this is not an ordinary case, as great interests are affected, as the position of the trust is peculiar, and connected with the general interests of the state, and as the trustees are public functionaries, presumably interested with the duties imposed upon them for public and politic reasons, we do not feel disposed to adopt such a course as might be admissible in an ordinary case of private trust.

Upon consideration of the matter, we have come to the conclusion that whenever the agents for making sales shall have effected a sale, for which the trustees shall refuse to execute proper conveyances, they shall report the same to the court, and if the same shall be approved by the court after the trustees have had due opportunity to be heard, an order to the effect shall be made; and the trustees will be directed to execute the proper deeds.

The case is a difficult one at best. It would be an absurdity to attempt to make a forced sale of such immense territories as might be required, at once, to raise the amount of moneys due, especially at this time of unusual financial depression. We feel bound to use a wise discretion in this matter, and whilst we feel bound to assist the bondholders in every practicable way to realize their arrears of interest in the shortest feasible time, we cannot entirely overlook the large interests which may be sacrificed by hasty and precipitate action.

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An order will be made in conformity with the views now expressed, namely, that hereafter, in case the said agents for sale shall report any sales by them effected to the trustees, and the latter shall refuse to execute the necessary deeds therefor, the agents shall report the same to the court, which will hear the matters, and if the negotiation be approved, will confirm the sale, and direct conveyances to be made.

The complainant's counsel has applied for an order to pay out and distribute the money now accumulated in the receiver's hands.

We see no objection to paying those who have registered their coupons according to the previous orders of the court, retaining the share of those whose coupons have not yet been properly verified, or have been rejected by the master, until further order.

Ordered accordingly.

J. C. GREELEY, Assignee of Joseph W. Scott, vs. JOSEPH W. SCOTT and wife et al.

The constitution of the state of Florida of 1868 reserves to each head of a family free from the claims of creditors, a homestead, without limit as to its value, of 160 acres, when the same is not in an incorporated city or town: *Held*,

1. That the purpose of this provision was to preserve to the debtor, not only his shelter, but his usual means of employment for the support of his family.

2. In the case of a farmer the exemption embraces his house and farm not exceeding the number of acres limited, together with the improvements thereon.

3. But a farmer's homestead would not embrace tenant houses, a sawmill, gristmill, or fullingmill, though erected on a portion of the tract of which the farm is a part.

4. A mill owner, who has a farm attached to his mill and cultivates it as a secondary business, could hold his residence and mill exempt, but not the farm also.

5. The owner of a sawmill who followed the business of sawing lumber, and whose mill was adjacent to his residence, would be entitled to hold the same as part of his homestead.

6. But he could not retain as a part of his homestead those portions of the 160 acres of land which were not ancillary to his business as a lumberman.

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IN EQUITY.

Submitted on motion for injunction. The facts appear in the opinion of the court.

Mr. H. Bisbee Jr., for complainant.

Messrs. J. J. Finley and E. M. L'Engle, for defendants.

BRADLEY, Circuit Justice. The assignee in this case filed the bill to prevent the debtor and his wife from setting up the right of homestead to a certain tract of land in the neighborhood of Jacksonville, which they claim as such. The whole tract consists of about forty acres in an unincorporated suburb called East Jacksonville, much of which has been laid out into building lots, and on which the bankrupt resides, and has a steam sawmill, which he has operated for many years as his principal business.

The constitution of Florida, adopted in 1868, reserves to every head of a family residing in the state, his homestead and \$1,000 worth of personal property, free from the claims of creditors. If not in an incorporated city or town, it may be a homestead to the extent of 160 acres of land; if in such city or town, half an acre, without any limit as to value in either case. The reservation, however, is only that of the homestead, and embraces no more, although the party may own more within the prescribed limit of quantity. It is very material, therefore, to know what is meant by and embraced in a homestead. Within the meaning of the constitution of Florida, however it may be elsewhere, it certainly embraces more than a house for a shelter; for it may extend to 160 acres of land, which could never be needed for that purpose alone. As 160 acres of land is the usual quantity for a farm in this country, the policy of the constitution seems to be to allow a man such quantity of land with his house, as he is accustomed to use therewith in the pursuit of his occupation. In other words, the object seems to be, not only to preserve to the unfortunate debtor his house for shelter, but his usual means of employment by which to earn his livelihood and support his family. The state as well as the individual himself is interested in his labor and industry, and therefore takes care that he shall not be deprived of the power to employ them.

In the case of a farmer, therefore, it is clear that the exemp-

tion embraces his house and farm not exceeding the amount limited; of course it includes (and so the constitution declares) the improvements thereon. Those improvements, however, must be such as to make them properly a part of the homestead, such as outhouses, barns, sheds, wagonhouses, fences, etc. They would not embrace tenant houses, though built on the farm, for these would be no proper part of the farm homestead. They constitute capital separately invested. They produce a revenue of their own, distinct from that of the farm.

For the same reason, the farmer's homestead would not include a sawmill, or a gristmill, or a carding and fullingmill, though erected on a portion of the tract of which the farm is a part. These are separate enterprises in which the farmer has been enabled to invest his surplus capital. They are no part of the farm. If he runs them, he does it as a separate business from that of his farm, and he cannot claim both as appurtenant to and part of his homestead. They constitute the basis of outside and separate industries.

A mill owner in like manner may have a farm attached to his mill, and work it as a separate and secondary business. He may claim his mill as a part of his homestead, but not the farm also. Otherwise, by multiplying his branches of business and trade, a man might have a large domain consisting of many establishments, and claim them all as incident to his homestead. This never could have been the intent of the constitution. It would be an unreasonable construction of its terms. Those terms must be fairly construed so as to fully carry out the policy of the constitution, and yet not to nullify all obligations of a debtor to pay his debts.

That the preservation of a householder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose, is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvements or buildings than the residence and business house of the owner, showing that the business house as well as residence is included.

But while the cases, which we have supposed, are comparatively easy of solution, a great many others will arise presenting

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greater difficulty and embarrassment. The amount of property, which the necessary interpretation of the exemption will sometimes embrace, will undoubtedly appear as a great hardship and injustice to creditors. It is a great stride from that state of things in which the sanctity of a debt induced the legislature not only to take from the debtor all his property, but even his liberty itself. It may be a question whether it is not carrying the principle of exemption too far for the public welfare. It is true that the farmer without his farm, the blacksmith without his forge, the miller without his mill, the trader or business man without his shop, in fine, any citizen without his place to work and labor or pursue his ordinary calling, is deprived of the power to support himself and his family, and becomes a burden instead of a help to the community. These establishments or places of labor or occupation are respectively adjuncts of a man's homestead, and, within the intent and meaning of the constitution of Florida, form a part of it. Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely: Whether the advantages obtained by the exemption are equivalent to the disadvantages arising from the unwillingness of capital to remain in a community where such an exemption exists; or whether from the latter cause, the law will not operate too depressingly upon enterprise. Speculation, however, is unnecessary. The people of the state of Florida have, in their constitution, declared what their will is on the subject, and that declaration is binding on both the people and the courts.

In the case under consideration, the debtor claims to follow the business and trade of sawing lumber, and asks to have his mill, which adjoins his dwelling, reserved as a part of his homestead. In our opinion, this claim is supported by the constitutional provision. The mill, in the sense of that constitution, is appurtenant to and part of the debtor's homestead. If it be objected that the value is unreasonably great, we answer that the consti-

tution prescribes no limit of value and the courts cannot prescribe one. As before stated, we think that a man's shop, store or mill in which he pursues his usual trade or avocation (as well as the farmer's farm) if connected with and adjacent to his dwelling, is intended to be included in his homestead. It is the stand or place on which and by means of which he may continue to pursue his industrial labor and be a useful citizen, and is within the object which the constitution has in view.

But the debtor cannot ask to retain those portions of the forty acre tract which are not ancillary to his homestead, considered as the homestead of a lumberman running a sawmill. Those portions will be for the assignee, under the direction of the district court, to separate from the rest.

Under the circumstances, we do not think that the debtor has pursued such a course as to throw undue embarrassments in the way of the assignee, which need to be removed by the interference of a court of equity. The main thing which he claims, the sawmill, we think he is entitled to claim, unless there is some foundation for the allegation of the bill that debts to a large amount, which have been proved, were incurred in the erection of improvements on the mill, and for labor. As this, however, will be a matter which the district court can better investigate when marshaling the assets of the bankrupt estate and enforcing any liens which particular creditors may have on particular parcels of property, we do not think there is any call for the interposition of this court.

The motion for injunction is denied and the bill dismissed, without costs and without prejudice to the complainant as to any part of the property except the house and sawmill, and such reasonable extent of land about the same as may be necessary and proper for their enjoyment as a homestead by the debtor and his family, and without prejudice as to the effect of debts contracted for improvements and labor.

We do not think that any decree should be made authorizing the assignee to sell the reversion of the homestead, as the constitution expressly declares that the exemption shall accrue to the heirs of the party having enjoyed or taken the benefit thereof. This, however, is also a question which the district

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court can as well decide as this court, and presents no ground for the interference of a court of equity.

Bill dismissed.

NOTE. — Upon the subject discussed in the foregoing case, namely, the character of the premises in which a homestead right may subsist, the reader is referred to the following cases, collected by Mr. Thompson, the learned editor of the Central Law Journal, on page 363, of vol. 2, of that periodical: *Mayho v. Cotton*, 69 N. C., 289; *Hubbell v. Canady*, 58 Ill., 425; *Re Tertelling*, 2 Dillon, C. C., 339; *West River Bank v. Gale*, 42 Vt., 27; *Buxton v. Dearborn*, 46 N. H., 43; *Martin v. Hughes*, 69 N. C., 293; *Williams v. Hall*, 33 Tex., 412; *Adams v. Jenkins*, 82 Mass., 146; *Kresin v. Man*, 15 Minn., 116; *Bunker v. Locke*, 15 Wis., 635; *Tumlinson v. Swinney*, 22 Ark., 400; *Rayland v. Rogers*, 34 Tex., 617; *Sarahas v. Fenlon*, 5 Kan., 592; *Finley v. Dietrick*, 12 Iowa, 916; *Taylor v. Boulware*, 17 Tex., 74; *Bassett v. Mcsner*, 30 id., 604; *Woodward v. Till*, 1 Mich. (N. P.), 210; *Parker v. King*, 16 Wis., 223; *Campbell v. McManus*, 32 Tex., 442; *Thorn-ton v. Boyden*, 31 Ill., 200; *Gregg v. Bostwick*, 33 Cal., 220; *Kelly v. Baker*, 10 Minn., 154; *Clark v. Shannon*, 1 Nevada, 568; *Mercier v. Chace*, 11 Allen, 194; *Goldman v. Clark*, 1 Nevada, 607; *Mills v. Estate of Grant*, 36 Vt., 269; *Lazell v. Lazell*, 8 Allen, 575; *Brown v. Keller*, 32 Ill., 151; *Casselmann v. Packard*, 16 Wis., 114; *Herrick v. Graves*, 16 id., 157; *Reinbach v. Walter*, 27 Ill., 393; *Dyson v. Sherley*, 11 Mich., 527; *Moore v. White*, 30 Tex., 440; *Walker v. Darst*, 31 id., 681; *Wassell v. Tumach*, 25 Ark., 101; *McDonald v. Badger*, 23 Cal., 393; *Kurz v. Brusch*, 13 Iowa, 371; *Stanley v. Greenwood*, 24 Tex., 224; *Phelps v. Rooney*, 9 Wis., 70; *Prior v. Stone*, 19 Tex., 371; *Hancock v. Morgan*, 17 id., 582; *Methury v. Walker*, 17 id., 593; *True v. Morrill*, 23 Vt., 672; *Cook v. Mc-Christian*, 4 Cal., 23; *Taylor v. Hargous*, 4 id., 268; *Walters v. People*, 18 Ill., 194; *Rhodes v. McCormick*, 4 Iowa, 368; *Crow v. Whitworth*, 20 Ga., 38; *Rogers v. Hawkins*, 20 id., 200; *Pinkerton v. Tumlin*, 22 id., 165; *Delaney's Estate*, 37 Cal., 176; *Thorn v. Thorn*, 14 Iowa, 49; *Hill v. Bacon*, 43 Ill., 477; *Williams v. Jenkins*, 25 Tex., 279; *Beecher v. Baldwin*, 7 Mich., 488; *Thomas v. Dodge*, 8 id., 51; *Helfenstein v. Cave*, 3 Clarke (Iowa), 287.

SOUTHERN DISTRICT OF MISSISSIPPI.

NOVEMBER TERM, 1873.

SARAH L. MOREY vs. THE NEW YORK LIFE INSURANCE COMPANY.

1. A life insurance company is under no obligation to give notice to the assured when the annual premium is about falling due, of that fact, unless it has agreed to do so, even though it had been the practice of the company to give such notice.
2. The promise of the local agent of a life insurance company, that he would give the assured such notice, was only a personal contract of the agent, and not binding on the company, unless the agent was authorized by the company to make such promise.
3. Where the assured has been in the habit of paying the annual premium to the local agent of the company, and such payments have been accepted by the company without objection, although the policy provided for payment at the principal office of the company, a tender to such agent of the annual premium, on the day it falls due, is sufficient to prevent a forfeiture of the policy for nonpayment of the premium.
4. The failure of the insurance company to place the receipt for the premium in the hands of the local agent does not excuse payment or tender of payment on the day the premium falls due.

ACTION AT LAW.

Submitted to the court on the issues of fact, as well as of law.
The facts are stated in the opinion of the court.

Mr. John Handy, for plaintiff.

Mr. T. J. Wharton, for defendant.

HILL, District Judge. This action at law was brought in the circuit court of Madison county, and removed into this court, to recover the amount of a policy of insurance, issued by the defendant on the first day of April, 1871, for the sum of five thousand dollars, payable to plaintiff upon the death of her late husband, John B. Morey, upon the payment of \$197.90, then made, and

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the same amount to be paid thereafter on the first day of April, of each year during the continuance of said policy, with the usual condition annexed, that if said premium should not be paid on or before the first day of April of each year, the policy should become void, and all payments theretofore made become forfeited to defendant.

The plea is that the policy became void under this stipulation by reason of the nonpayment of the premium due on the first day of April, 1873, to which the plaintiff replies: First, that when said John B. Morey made application for said policy, it was to one Morey, a local agent of defendant, doing business for defendant in the city of Canton; that at the time, he stated to said agent that he feared he would forget the time when the premiums would become payable, and fail to make them in proper time, and thereby the policy would become forfeited; that the said agent stated, as an inducement to said John B. to take said policy, that the company was in the habit of giving thirty days previous notice of the time, and that he would give the notice and save the forfeiture; and, secondly, that it was understood that payment would be made to the local agent in Canton; that at the time the premium fell due, the agent at Canton had not been furnished with the printed premium receipts, without which he was not authorized to receive payment; that the failure to give the notice and to furnish the receipt was a waiver of the right to a forfeiture of the policy.

A jury being waived, the questions of both law and fact are submitted to the court.

The only facts shown by the proof, and necessary to be stated for the application of the rules of law, are as follows: Morey, the agent of defendant, did make the statements to John B. Morey at the time the application for the policy was made, as stated in the pleadings; the advance premium was paid on the delivery of the policy; no notice of the time the premium fell due was given; John B. Morey died the 3d day of April, two days after the premium fell due, without having paid or tendered the same to any one. On the 5th, payment of the premium was tendered to the agent at Canton, and refused, for the reason that John B. Morey had died on the 3d.

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The premium receipt was not forwarded to the general agents at Vicksburg until the 4th, and not forwarded to the local agent until the next day.

The question upon the pleadings and proof is, Did the want of notice of the time of payment, and the absence of the receipt in the hands of the local agent, excuse the payment of the premium upon the day it became due, and thereby avoid the forfeiture stipulated in the contract? The policy, and the conditions annexed to it, constituted the contract, and must be held binding on both parties to it, unless its conditions have been waived by some act or omission of the party against whom it is sought to be enforced, or by the authorized agent of such party.

The proof fails to show that the agent Morey had any authority to engage that notice should be given; indeed, none such is claimed; but it is claimed that, being the agent, it was a fraud in him to make such a promise, as it misled the assured, and induced him to take the policy which he would not otherwise have done; but it is apparent from the proof that he did not make the promise as agent, or pretend to bind the defendant, but only made it as a friend and relative of John B. Morey; it was a mere personal promise, for the fulfillment of which he could only look to him who made it. Morey, the agent for this purpose, was more the agent of the assured than of the insurer; so that, upon the facts, this want of notice cannot avail the plaintiff.

The remaining question is, Did the failure to place in the hands of the agent at Canton the premium receipt, on or before the time of payment, waive and excuse payment on that day? The conditions of the policy require payment at defendant's office, in the city of New York, unless a different place is stipulated for in writing between the parties, or to an agent having for delivery a printed receipt, signed by the president of the company or other officer mentioned.

The advance payment was made to the local agent in Canton upon the delivery of the policy. The fact that the premium receipt for the second payment was forwarded to the local agent in Canton shows that that was the place where payment was expected to be made, and where it doubtless would have been made

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but for the death of said Morey. Such evidently being the understanding between the parties, I am satisfied that had the tender of the amount due been made to the local agent at Canton on the day and within the time stipulated, the forfeiture claimed could not have been maintained; but, unfortunately for the plaintiff, this was not done. I cannot accept the position as correct, that nothing can avoid the forfeiture but an agreement of waiver of payment made by the principal officers of the company in New York, or by actual payment or tender of payment there, or to a local or other agent having the premium receipt, signed as provided for. Where, by an express agreement or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in sufficient time that payment must be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy holder and prevent the forfeiture. To hold otherwise would open the door to the grossest frauds upon the part of these foreign insurance companies. It is said, and is in proof, that these receipts are furnished to the local agents through the general agency for the state; and if the agent's accounts at the principal office are not satisfactory, the receipts are withheld. The answer to this is, that it is a thing about which the policy holder is not presumed to know anything; it surely cannot be held that he is responsible, or to be affected by dereliction in duty of the company's agent, over whom he has no sort of control. John B. Morey is not presumed to have known of the absence of the receipt, and its absence could have had no influence upon his unfortunate neglect; and however much it is to be regretted that the widow and orphan will be deprived of the maintenance and support a kind husband and father intended for them, the rules of law must be applied to the facts, which being done, necessarily results in favor of the defendant.

If the company, when its coffers have been in part filled with the hard earnings of the policy holders, could withhold the receipt from him who had been depriving himself and family of the comforts if not the necessities of life for years, to provide,

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as he supposed, something for his helpless family when he should have been laid in the grave; and when he comes, perhaps on the last moment in which payment can be made, he is for the first time informed that he must pay in New York, or all he has paid will be forfeited — a thing which it is impossible for him to do — would be gross injustice.

Judgment for defendant.

MAY TERM, 1875.

THOMAS & WILLIS vs. EDWARD WOOLDRIDGE et al.

(Before BRADLEY and HILL, JJ.)

A judgment rendered in a circuit court of the United States cannot be attached by process issued out of a state court against the plaintiff in the judgment.

IN EQUITY.

The case was as follows:

On the 27th of May, 1874, Wooldridge recovered a judgment for \$4,800 against the complainants as partners, in the circuit court of the United States for the southern district of Mississippi. Afterwards, on the 2d of June, 1874, one Hedrich, a citizen of Louisiana, brought an attachment suit in the circuit court of Warren county, Mississippi, against Wooldridge for \$6,000. Writs of attachment and garnishment were issued and served upon Wooldridge and upon the complainants in this suit, who were the judgment debtors of Wooldridge.

In July following, the complainants paid to the marshal, who held an execution issued on the judgment against them, a sum sufficient to satisfy the costs of suit and the fees of the counsel of Wooldridge for obtaining said judgment, amounting to the sum of \$1,077; and the execution was thereupon returned by the marshal to the United States circuit court.

The complainants then filed their answer in the attachment suit in the state court, acknowledging themselves indebted to Wooldridge on the judgment in his favor in the sum of \$3,773.

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Notwithstanding these facts, the attorneys of Wooldridge caused another execution to issue on the judgment against complainants, which was placed in the hands of the United States marshal, who threatened to seize and sell the property of the complainants to satisfy the same.

The complainants, believing they were bound to pay the balance due on the judgment recovered against them by Wooldridge to Hedrich, the plaintiff in the attachment suit, filed the bill in this case against Wooldridge and his attorneys, and against the marshal, to enjoin proceedings to collect the balance due on said judgment by virtue of the execution issued thereon. A preliminary injunction was allowed, restraining the defendants according to the prayer of the bill.

The case was heard for final decree upon the pleadings and evidence.

Messrs. R. S. Buck and E. D. Clark, for complainants.

Messrs. T. J. Catchings and W. K. Ingersoll, for defendants.

BRADLEY, Circuit Justice. The question in this case is, whether a judgment of this court may be attached by process issued out of a state court against the plaintiff in the judgment.

The general rule applicable to foreign attachments by the custom of London (from which our attachment laws are derived) is, that a debt of record in a superior court, and even a debt in suit, cannot be attached. Different reasons have been assigned, namely, that a record is of too high a nature to be attached; that it is against the dignity of the court to be thus interfered with; that the debt is *quasi in custodia legis*, and that the party has no opportunity to plead the attachment. 1 Rolle Abr., 552; Com. Dig. Attach., (D.); Bac. Abr. Customs of Lond., (H. 1); 1 Leonard. 29; S. C., Cro. Eliz., 63; Cro. Eliz., 691; *Shinn v. Zimmerman*, 3 Zab., 150.

But whatever may have been the ground of the rule, it has been adhered to in many of the states, though not in all. Serg. on Attach., 73; Drake on Attach., §§ 638-643. The question is made to depend somewhat on the statutes of the particular states. In those of Mississippi, there does not seem to be anything peculiar, if that would make any difference in the result.

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Perhaps the best reason for the rule is, that an attachment of a judgment would be an inconvenient and dangerous interference with judicial proceedings, opening the door to fraud and collusion for the purpose of preventing the due course of justice. And there are peculiar reasons why the judgments of state and federal courts should not be subject to attachments issued by each other, in the desire which each should have to avoid conflicts of jurisdiction. A court has not done with a case when judgment has been rendered. Many things have often to be done besides issuing executions; many adjustments of rights have to be made, which require that the court should keep the supervision and control of its own judgments in its own hands. Any interference by other courts with this control, or with the prerogatives of executing its judgments and decrees in its own way, is calculated to excite jealousies between the courts concerned. We think the rule is a good one, and that it ought to be sustained.

It is not without sanction in the decisions of the United States courts. Besides that of Justice STORY, in *Franklin v. Ward*, 3 Mason, 136, which is referred to in the brief of counsel, the case of *Wallace v. McConnell*, 13 Pet., 136, is very much to the point. There a debt was attached in a state court after suit had been brought upon it in the United States court, and the attachment was set up by way of a plea, *pais darrein continuance*. This plea was demurred to and overruled, and the supreme court, on error, affirmed the judgment. The court held that to sustain such an attachment would produce a collision in the jurisdiction of the courts that would extremely embarrass the administration of justice; but that if the attachment had issued before commencement of suit in the federal court, it might have been pleaded in abatement, if still pending, or in bar, if judgment had been rendered thereon.

This case virtually decides the one before us, and precludes further discussion.

The injunction must be dissolved and the bill dismissed with costs. Decree accordingly.

HILL, District Judge, concurred.

Austin vs. O'Reilly, Assignee.

J. E. AUSTIN vs. H. E. O'REILLY, Assignee of Steele & Co.

1. All liens, except such inchoate ones as arise upon an attachment, are protected by the bankrupt law.
2. The right to distrain for rent does not give the landlord, strictly speaking, a lien upon the goods subject to distraint.
3. But such right may fairly be classed as a lien, within the intent and meaning of the bankrupt act.
4. In Mississippi, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent, but when the attachment is sued out, his rights are the same as those of a landlord at common law.
5. Although the high court of errors and appeals of Mississippi has held that the landlord's right does not constitute a lien, and that a *bona fide* mortgage or sale will displace it, nevertheless, these decisions are not sufficient to deprive the landlord, in bankruptcy proceedings, of his right of priority of payment over the general creditors, out of the proceeds of goods subject at the time the proceedings in bankruptcy were commenced, to his right of attachment.

PETITION OF REVIEW to reverse an order of the District Court sitting in bankruptcy.

Mr. E. D. Clark, for petitioner.

Messrs. W. B. & A. B. Pittman, for the assignee.

BRADLEY, Circuit Justice. This case depends on the question, whether, in the state of Mississippi, a landlord, whose tenant becomes a bankrupt before any attachment has been issued for rent, is entitled to priority of payment over the general creditors. This question must be decided in view of the provisions of the bankrupt law, and the peculiar rights of landlords, in reference to enforcing payment of rent in Mississippi. The bankrupt act (sec. 14) declares that the assignment shall relate back to the commencement of proceedings in bankruptcy, and that by operation of law, the title to all property and estate, both real and personal, of the bankrupt, shall vest in the assignee, although attached on *mesne* process, and shall dissolve any such attachment made within four months next preceding. The inchoate lien obtained by an attachment, and not perfected by judgment, is thus rendered null by the proceedings in bankruptcy. But perfected liens are protected.

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It is provided by the same section that the assignee, under authority of the court, may redeem or discharge any mortgage, pledge, deposit, or lien, and tender performance of the condition thereof, or sell the property subject thereto; and section 20 of the bankrupt act provides that when a creditor has a mortgage, pledge, or lien, for securing his debt, he shall be admitted as a creditor against the general estate only for the balance due him after deducting the value of the property on which he has such security, unless he consent to release it.

These provisions show that all liens, except such inchoate ones as arise upon an attachment, are protected by the law.

But how do these provisions operate upon the peculiar lien, or right of distress, given to a landlord for his rent? That right, at common law, was founded on the principle that the landlord retained his ownership, not only in the land, but in so much of the produce thereof as was reserved by him for its use. Such reserved portion, or *reditus*, was considered as belonging to him by virtue of his original ownership; but not being separated from the rest of the profits, he could only seize a reasonable amount as a distress or security to compel the payment or appropriation of his stipulated portion. When the render consisted of personal service, such service was regarded as in lieu of the profits of the land, to which, until the service was rendered, the landlord's qualified property and right of distress extended, as in case of actual rents. The legislature afterwards extended the right of distress to other things besides the profits of the land; and, as far as the right extended, the principle of the latent or qualified property of the landlord in the subject of distress accompanied it. Other legislation enabled him to sell the goods distrained, in order to realize the amount of his rent, if the tenant proved refractory. In some states it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising his right does not affect the nature of the right itself.

It is common to call the right a lien, and yet it is not strictly such; for it does not attach to any specific article of property. The tenant, if a farmer, may, in due course of business, sell pro-

duce or cattle or other things; and if a merchant, he may in the same manner sell merchandise; and the sales, if made in good faith, will be valid, and the property sold will be free from the landlord's right of distress, if removed from the demised premises, and, in most states, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by the English statutes and by the statutes of most states, follow the property within a reasonable time after its removal.

Now if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being commonly called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to the interests both of the tenants and their creditors, by inducing landlords to require onerous conditions for their security, the supreme court of the United States, and most of the district and circuit courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the bankrupt act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress.

This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent, or a reasonable amount (generally a year's rent), which may have accrued. Thus in *Longstreth v. Pennock*, 20 Wall., 575, the supreme court places special emphasis on this fact.

In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution; or, more properly speaking, of a distress. He has the same right of priority over execution creditors, and the

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same right to prevent the removal of goods and to follow goods clandestinely removed, which exists in England and most of the other states. It is true that the supreme court of this state has held that the landlord's right is not a lien; and that a *bona fide* mortgage or sale by the tenant will displace it.

I do not think, however, that these decisions are sufficient to deprive the landlord in bankruptcy proceedings of his just right of priority over the general creditors. They gave credit with the understanding that the landlord's right was superior to theirs. He, therefore, has an equity to be preferred. With regard to them, he stands in precisely the same position and invested with the same rights, as if his common law right of distress remained.

A decree will be made, declaring the right of the landlord to be preferred before the general creditors upon the proceeds of all goods subject to his right of attachment, at the time the proceedings in bankruptcy commenced.

W. G. WYLIE vs. SMITH & BROTHER and WILLIAM BRECK, their Assignee.

1. Rent accruing after bankruptcy cannot be brought in question in the bankrupt court.
2. Where rent had accrued before the bankruptcy, and was secured by a lien upon the crop grown on the demised premises, and the bankrupts had collected such rent from their under-tenant, the district court properly entertained jurisdiction of a petition filed by the landlord against the bankrupts and their assignees, for the purpose of following the fund bound for the satisfaction of the rent, in order to prevent the claim for rent from coming against the general estate of the bankrupts.

PETITION to review decree of the district court sitting in bankruptcy.

Messrs. Robert C. Smith and F. B. Pratt, for petitioner.

Mr. George L. Potter, contra.

BRADLEY, Circuit Justice. Smith & Brother became bankrupts, March 25, 1871, being decreed such, April 7, 1871. They

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were leasees of a plantation for the year 1871, from Wylie, at a rent of \$500, payable on the 1st of November, secured by a lien on all the crops. The assignee refused to accept the lease, and Smith & Brother remained in possession by their under-tenants from whom they collected \$396 rent, which they did not pay to their landlord, Wylie. The rent accruing after bankruptcy, it is conceded, cannot be brought in question in the bankrupt court. The rent which accrued before bankruptcy was a provable debt under the bankruptcy proceedings. The act says expressly (sec. 5071, Rev. Stat., sec. 19 of the original act): "Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." Being so provable, the debt was discharged *pro tanto* (sec. 5119, Rev. Stat., or 34 of the original act). Hence the landlord could not maintain an action therefor. And being secured by a lien on the crops, he could not prove the debt in bankruptcy without surrendering his lien. As this lien secured not only the rent in question, but the rent for the balance of the year, a surrender of it would involve complications and expense desirable to avoid, if possible. Besides, the crops belong to the under-tenants, and they have paid to Smith & Brother, \$396, and have an equity against the latter, to be relieved from the lien to that extent. Under these circumstances, Wylie filed a petition in the bankrupt court against Smith & Brother and their assignee, praying that they might severally be decreed to pay him whatever they had severally received on account of said rents, and that the assignee might be decreed to make up the deficiency of the rent out of the general estate, and for general relief. As before observed, the bankrupt court has nothing to do with rent which accrued after the bankruptcy. For that which accrued before, which is a provable debt and secured by lien as aforesaid, it seems proper that the court should entertain jurisdiction for the purpose of following the fund bound for the satisfaction of the debt, in order to prevent its coming against the general estate of the bankrupts. To this extent the district court has made a decree against Smith & Brother, who possessed themselves of this fund

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pending proceedings in bankruptcy, by collections from their under-tenants. I think the decree was right and should be affirmed.

The amount of rent accrued prior to the bankruptcy should be slightly modified, and made up to the 25th of March, instead of the 7th of April; in other words, to the commencement of proceedings in bankruptcy instead of the decree. The general rule, as established in sec. 5067 (or sec. 19 of the original act), is that "all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy * * may be proved against the estate of the bankrupt." The commencement of proceedings in this case was the 25th of March. The defendants also supposed that the lease commenced on the 30th of January; but this is incorrect, for though dated on that day, the term leased is the whole year 1871. The number of days, therefore, for which rent is to be allowed is 84; and the amount is \$115.07, instead of \$134.40, as allowed in the decree of the district court. The decree, therefore, will be corrected accordingly, allowing interest from the 1st of November, 1871.

The reference to a master for the purpose of taking an account of setoffs claimed by the defendants is correct.

The decree is affirmed in all things, except as to the amount thereof, which is reduced from \$134.40 to \$115.07, with interest from the 1st of November, 1871, and subject to all just setoffs of Smith & Brother against the petitioner, not more properly applicable to the rent which fell due after the bankruptcy.

FRIEDLANDER & GERSON vs. ROBERT G. JOHNSON and wife.

1. If a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment, pledge, or in any other proper way.
2. A statute of Mississippi declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of his possession of such property, without notice of the trust." *Held*,

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(a) That this statute could not avail a creditor of the husband when the wife's property had once stood in the husband's name, but had been conveyed by him to a third person, who purchased in good faith and who had made a *bona fide* conveyance to the wife for a valuable consideration.

(b) That a creditor of the husband, in order to have the trust raised by the statute declared void in his favor, must show that credit was given by him to the husband in special and specific reliance on that particular trust property.

8. When either the money or any other assets of one person are used by another to purchase property in his own name, a resulting trust arises in favor of the party with whose means the purchase is made.

IN EQUITY.

This was a creditor's bill, brought to subject a certain plantation, of which the legal title stood in the name of Elizabeth Johnson, to the payment of a judgment recovered by the complainants against her husband, Robert G. Johnson.

The defendants, Johnson and wife, were married in 1853, having previously entered into a marriage settlement by deed *inter partes*, whereby all the property of the wife was conveyed to a trustee for her separate use, leaving her free as if she were unmarried, and sole and perfect owner to lease, alien, encumber, devise or bequeath the same, or any part thereof, according to her own will and pleasure.

The defendant Robert G. Johnson, at the time of his marriage with his wife Elizabeth, had no property, while she was the owner of a plantation, a number of negroes, and a considerable estate, valued altogether at from twenty-five to forty thousand dollars. After the marriage, the husband took charge of the property and conducted its business in his own name. A few years after the marriage, when it became evident that his wife would bear him no children, the husband conceived the design of getting his wife's property in his own name, so that it should not go to her relations at her death. In pursuance of this design, he purchased in 1856 the plantation now in question, from one George W. Hogan, for ten thousand dollars, and took the title in his own name and paid for it out of the proceeds of his wife's separate estate.

In February, 1866, Mrs. Johnson entered into partnership with one Howard, an inmate and protégé of the family. The

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evidence was conflicting whether he had any means, but its weight tended to show that he had considerable at that time. It was clear that the business of the concern was quite large in amount. At the time of the formation of the partnership, Johnson conveyed to Howard the plantation in question for twelve thousand dollars, secured by the two notes of Howard for six thousand dollars each. One of them was paid by advances to Johnson, the other still remained outstanding in 1868, when the partnership business was closed, and the plantation was conveyed to Mrs. Johnson by Howard, and his remaining note for the purchase money given up to him. The note thus surrendered to Howard had been appropriated to Mrs. Johnson by her husband, in consideration of the large amount of her property which he had converted to his own use. The note was surrendered to Howard contemporaneously with the delivery of the deed by him to Mrs. Johnson for the plantation in question, and was the consideration therefor.

Messrs. James Z. George and A. M. Harlow, for complainants, cited Code of Miss., 1857, p. 336; *Shield v. Hardy*, 44 Ill., 68; McQueen on Husb. and Wife, 332; Reeve's Dom. Rel., 262, 263.

Messrs. W. L. Nugent and D. & S. W. Jones, for the defendants, cited *Walker v. Guntharp*, 13 S. & M., 764; 2 Story's Eq. Jur., secs. 1201, 1211a; 4 Kent's Com., 310; Adams' Eq., 165; *Ratcliff v. Collins*, 5 Geo., 581; *Butterfield v. Stanton*, 44 Miss., 26.

BRADLEY, Circuit Justice. A clearer equity of a wife has rarely been shown in a court of justice. Unless prevented by some technical rule from having her rights, so far as the property in question is concerned, she must prevail in this suit.

Technical law is cited to show that a resulting trust could not arise in favor of Mrs. Johnson, when her husband originally purchased the property from Hogan. But she does not stand on a resulting trust. She has the legal estate, and does not seek the benefit of any such trust. The complainants have come into the court to press an equity which they claim to have against Mrs. Johnson. They come subject to the rule that he who asks equity

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must do equity. Whether Mrs. Johnson had or had not a resulting trust, which she could have enforced, is not material. Her money or her property went to the purchase of this plantation. She was equitably entitled to be repaid or secured out of her husband's estate. He placed Howard's note in her hands for this purpose; with this note she acquired the legal estate in the land. Surely her equity to keep it is greater than the complainant's equity to take it from her.

It is well settled that if a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment or pledge, or in any other proper way. See 2 Story's Eq., §§ 1404-1415, and *Sykes v. Chadwick*, 18 Wall., 141. This is all that was done in this case.

We are met, however, by the statute of Mississippi, which declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of the possession of such property, without notice of the trust" (Code, 376). The complainants claim the benefit of this law. They allege that the property in question, though purchased with the wife's money in 1856, stood in the husband's name until 1866, and that they gave him credit on the faith of his ownership thereof, without notice of the trust. This plea cannot avail the complainants unless they can prove that the conveyance to Howard was a fraudulent one, intended to cheat them. For, if the conveyance to Howard was valid, then the title of Mrs. Johnson is unimpeachable, if she was equitably entitled to the note of Howard, which her husband transferred to her. From the evidence in the case, it would have been difficult for the complainants to attack the title of Howard. Johnson may have sold the property to him because he was largely in debt, and in order to have its proceeds in more manageable shape in case of being pressed by his creditors. But there is no evidence that it was not sold for its full value, or that Howard did not purchase it in good faith. If this was the case, there was no law to prevent its sale. The bankrupt law, if it would have affected the

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transaction, had not then been passed. At all events, the complainants never did attack it, although they recovered judgment against Johnson in November, 1866, and failed to collect any thing thereon.

But, aside from this consideration, it is questionable whether the statute referred to can fairly be quoted by the complainants in their favor. By the decisions of the supreme court of Mississippi, it would seem that a reliance on property thus situated, namely, purchased with the wife's money, in order to give the husband's creditors a priority over the wife, must be a special and specific reliance, giving actual credit to that particular property. Thus, in *Butterfield v. Stanton*, 44 Miss., 26, it is laid down with regard to the statute in question as follows:

1. "That it is exceptional and almost penal, as to the wife, in declaring a trust to her use void, in the contingency stated. This statute ought therefore to be strictly construed.

2. "Though the statute declares the trust void as to a class of creditors, it creates no lien on the property. The property thus subjected to their debts is bound only as other property, there being no lien until one is obtained by judgment, mortgage or otherwise. There is none *per se*.

3. "The trust provided for in this statute is available to the wife except as to those creditors giving credit on account of this particular property. To benefit creditors, the contract of credit ought, therefore, to be based upon it, and it ought in some way, to be defined or distinguished by the parties at the time of the credit. It should be definitely made to appear that the particular property was the occasion of the credit."

Now, in the present case, Johnson, at the time the complainants gave him credit for their present claims against him, was in possession of other property to a large amount, and was producing large annual crops which were disposed of through the agency of the complainants as his commission merchants. It cannot be pretended that they gave any such special credit to the particular property in question, as is mentioned and required in the foregoing abstract of the decision referred to. On the contrary, in March, 1861, when the complainants were taking security from Johnson for his then indebtedness to them, amounting

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to over \$12,000, they took from him a trust deed on other property standing in his name, together with certain slaves, and did not take any lien on the property in question. It is true, they say that they supposed that the latter property was included in that trust deed; but this is denied by Johnson, and no evidence is offered to sustain the statement.

As to the position that a resulting trust only arises when actual money of another is used in the purchase of property, and not when other assets are so used, it has no foundation in reason or authority.

The plea that the wife gave her consent to the use of her slaves and other property, in purchasing property in her husband's name, cannot avail in this case, because, even if she did give such consent, and if she was bound by it (which under her peculiar circumstances may be doubted), she, at any rate, became a creditor of her husband to the amount thus appropriated, and this was a good consideration for the note of Howard, which she received, and with which she obtained the deed for the property which she now holds.

In any point of view in which the case may be considered, we are always met by the wife's equity standing out in bold relief, and dominating every claim which the complainants may assert in their favor.

Bill dismissed.

THOMAS P. LEATHERS VS. THE SALVOR WRECKING & TRANSPORTATION COMPANY.

1. A steamboat, while under impressment by the Confederate States, was sunk, and was afterwards paid for in full by the confederate government. *Held*, that the wreck thereby became the property of the confederate government, and in the surrender of the confederate forces to the federal forces, became the property of the United States.
2. Photographic copies of public documents on file in the departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way, by proof of handwriting.

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ADMIRALTY APPEAL.

The libel was filed to recover damages of the respondents for wrecking and dismantling the steamboat Natchez, which was sunk in the Yazoo river, and which the libelant claimed to be his property.

The defense was, that the Natchez was sunk while under impressment in the service of the Confederate States, and was paid for in full by the confederate government, and thereby became the property of that government, and upon the surrender of the confederate forces to the federal forces, she became the property of the United States, and that she was raised and dismantled by the respondents under a contract with, and by authority of the United States.

Mr. J. W. M. Harris, for libelant.

Mr. W. B. Pittman, for respondent.

BRADLEY, Circuit Justice. The respondents show that the machinery of the steamer Natchez was rescued from the Yazoo river after the close of the late war, under authority from, and by contract with the government of the United States, by which the salvors were to have one-half of all that should be realized after the payment of expenses.

If the steamer Natchez was impressed into the service of the Confederate States government, and was burnt and sunk whilst in that service, and if full compensation for the vessel's loss was paid to the libelant by that government, the property of the wreck thereafter belonged to it; and at the close of the war, became the property of the government of the United States, which thereupon acquired a right to dispose of the wreck as it saw fit. It is evident that the government of the United States acted on the supposition that it was the owner of, and entitled to the control of the wreck. The authority given to the wreckers, and the contract made with them, are evidence of this. The latter got only one-half of the net proceeds of the property. The balance was retained by the government.

Without stopping to inquire whether thus acting under the authority of the government of the United States would or would not be a full defense for the wreckers, and for the re-

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spondents in this suit, it is clear from the evidence that the libellant's transactions with the Confederate States government bear out the hypothesis that he obtained therefrom the full value of the steamboat, and that whatever was left of her hull and machinery belonged to that government, and, by consequence, became the property of the United States.

The libellant, however, testifies, no doubt sincerely, that the amount received by him from the confederate government, was received as compensation for the services of the steamboat. But a long period of time has elapsed since the events occurred; and an examination of the documents themselves is conclusive that the said amount was the valuation of the vessel itself, and was so understood by the libellant at that time, and received by him as such. It is unnecessary to go into a minute examination of the papers for the purpose of showing the truth of this proposition; it is too apparent for argument.

It is objected by the counsel for the libellant, that the documentary evidence in question is not properly authenticated. We think it is sufficiently authenticated to make it competent. The original papers are on file in the war department, and cannot, without public detriment and inconvenience, be removed. Photographic copies are the best evidence that the case admits of. The wonderful art by which they are reproduced gives us, as we may say, duplicate originals; and in the case of public records or documents properly deposited in the public archives of the country, and which the public interest requires should be there kept and preserved, no better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies, and an authentication of their genuineness in the usual way, by proof of handwriting. We think the evidence entirely competent and entirely conclusive.

We come to the conclusion, therefore, that the libellant had no interest in the wreck at the time of its recovery, and that he cannot recover in this suit.

The conduct of the libellant, since the war, is corroborative of this conclusion. He lay by for almost or quite six years after he says he saw the machinery at Vicksburg, on the vessel now attached, before bringing his suit. This is a period which of

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itself would present strong evidence of laches, and a stale demand, which is a defense in admiralty proceedings.

These views render it unnecessary for us to consider more fully the objection as to the validity of the amendment made in the libel, concerning which grave doubts may well be entertained.

The decree of the district court must be reversed, and the libel dismissed, with costs.

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10. The extinguishment of a fire in a ship lying at the wharf of a city, by its fire department, does not entitle the firemen to salvage, even though there is no city ordinance requiring them to extinguish fires. *Dacey v. The Mary Frost and Cargo*, 306
11. Where the captain of a ship having goods on board was requested by the consignee to deliver them at once, and replied that he would begin discharging them at 12 o'clock noon, or soon after, and did so, and gave notice thereof to the consignee, who said his clerk would attend to them and take care that they were all removed from the wharf, and the clerk neglected to employ drays sufficient to carry off the goods before night, and a portion of them were left on the wharf during the night, and the captain of the ship piled them up and covered them with tarpaulins, and placed a watchman over them, and the ship's agent had general orders from the consignee not to store his goods: *Held*, that there was a good delivery of the goods, and the ship was not liable for damage done them by rain during the night. *Ellsworth v. The Bark Wild Hunter*, 315
12. A vessel is unseaworthy that is not manned by the necessary officers and crew, but no recovery can be had against her on that account for a loss that was not attributable to such deficiency. *The Planter*, 490
13. The fact that a vessel without having encountered any tempestuous weather, suddenly springs a leak within twenty hours after leaving port, so that her officers are compelled, in order to save her from sinking, to throw overboard more than one-third her cargo, raises the presumption that she was unseaworthy when she commenced her voyage. *Ib.*
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16. A steamboat, while under impressment by the Confederate States, was sunk, and was afterwards paid for in full by the confederate government. *Held*, that the wreck thereby became the property of the confederate government, and in the surrender of the confederate forces to the federal forces, became the property of the United States. *Leathers v. The Salvor Wrecking Co.*, 680

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ALIENS.

1. Where by the laws of a state, aliens are prohibited from acquiring and holding real property, a deed made by A. to B. upon a secret trust for C. who is a foreigner, A. having no knowledge of the trust, is not void; the trust only is void. *Hammekin v. Clayton*, 336
2. By the law of Mexico, which was in force in Texas from the 17th of March, 1836 to the 20th of January, 1840, aliens were prohibited from holding lands except by titles issuing directly from the government. *Ib.*
3. By the common law, an alien might hold real estate against every one and even against the government until office found. *Ib.*
4. The same rule prevailed in the civil law of Mexico and Texas. Therefore, when an alien to the republic of Texas took a deed not emanating from the government to lands within the territory of the republic, his title was good against all persons until after some proceeding analogous to office found by which his title was declared void. *Ib.*

AMENDMENT.

Where an action was brought in the name of A. for the use of B., and it appeared on the trial, that before suit brought, A. had assigned the claim to B., who, therefore, held the legal title, an amendment under the code of Georgia was allowed after verdict by striking out the name of A. from the petition. *Whitaker v. Pope*, 463

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1. A proceeding in the district court in the nature of a suit in equity, brought by the assignee and creditors of a bankrupt to set aside the claim of an alleged creditor, and to abrogate the lien asserted by him on the bankrupt's property, is appealable to the circuit court under section 4980 of the revised statutes. *Morris, Assignee, v. Brush's Executors*, 354
2. A compliance with general order in bankruptcy XXVI, in relation to the time of filing such appeal in the circuit court, is not necessary, to give the court jurisdiction. *Ib.*
3. But the order mentioned is a rule of practice in the circuit court, and if disregarded, the appellee has *prima facie* ground on which to move to dismiss the appeal. *Ib.*
4. A transcript of the proceedings of the district court is not required to be filed within the ten days prescribed for filing the appeal in the circuit court, but only a statement of appellant's claim and a brief account of what has been done in the district court and the grounds of appeal. *Ib.*
5. Where the decree of the district court disallowing a claim against a bankrupt estate was entered on January 21st, notice of appeal given January 27th, and the appeal bond filed in the clerk's office of the district court on January 28th; and before the next term of the circuit court, but not until May 22d, the declaration of appellant, setting forth his claim and the history of the proceedings was filed in the circuit court, at which time a transcript of the proceedings in the district court was also filed, *held* that the circuit court had jur-

- isdiction of the case and could hear it or not in its discretion, according as it might or might not be satisfied with the excuse offered for the delay in filing the papers. *Ib.*
6. A district judge sitting in the circuit court may in a proper case enlarge the time for filing an appeal in the circuit court. *Ib.*
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Attorneys at law, in the exercise of their proper functions as such, are not liable for their acts when performed in good faith, and for the honest purpose of protecting the interests of their clients. *Campbell, Adm'r, v. Brown,* 349

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1. The bankrupt court, in a proceeding by two partners in a firm of three, to have the partnership adjudicated bankrupt, has jurisdiction over the partnership property, although the third partner, in a proceeding in a state court to settle the partnership, and to obtain a decree for the amount due him from his copartners, has had himself appointed receiver and is in possession of the partnership assets. *In re Hathorn & Batchelor,* 73
2. In such a case, the bankrupt court may enjoin such third partner from disposing of the assets of the partnership, or from any interference with them until the question, whether or not the firm is bankrupt, can be tried. *Ib.*
3. A general creditor of the grantor cannot proceed to set aside a conveyance either really or constructively fraudulent, unless he has a lien on the property conveyed, or has reduced his claim to judgment. But this rule does not apply to an assignee in bankruptcy. The adjudication of bankruptcy arrests the proceedings of creditors to obtain judgments. The assignee may therefore proceed to impeach a deed of the bankrupt as fraudulent, although the creditors have not reduced their claims to judgment, and although they have no specific lien upon the property conveyed. *Barker v. Barker's Assignee,* 87
4. A suit brought by the assignees in bankruptcy of a bank, to recover money paid as counsel fees by persons acting without authority, as commissioners for the liquidation of the bank under the state law, is barred unless brought within two years from the time the cause of action therefor accrued in favor of the assignees. *Milttenberger et al., Assignees, v. Phillips,* 115
5. A discharge in bankruptcy must be pleaded. It cannot be set up after judgment as a reason why the judgment should not be enforced. *Goodrich v. Hunton,* 137

6. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the court, the bankrupt is thereby discharged only from the claims of the creditors whose names, addresses and debts are placed on the statement produced at the meeting of the creditors. *In re Becket*, 173
7. In such a case, no discharge granted by the court is necessary or proper, *Ib.*
8. A landlord cannot prove, as a claim against a bankrupt's estate, a demand for rent which accrued after the bankruptcy. *In re Commercial Bulletin Company*, 220
9. But neither the bankrupt nor the assignee can claim to occupy leased premises after the bankruptcy, without paying the rent in full. *Ib.*
10. If either the bankrupt or the assignee continues to occupy the leased premises after the bankruptcy, he is liable for the rent, and the landlord has the same lien upon the goods on the premises as he has upon the goods of other tenants. *Ib.*
11. Where a bankrupt's assignee occupied, after the bankruptcy, for storing the goods of the bankrupt's estate, premises which had been leased to the bankrupt, it was no answer to a demand for rent by the landlord, for the assignee to say that all the assets of the estate had been consumed by the general expenses of the bankruptcy. *Ib.*
12. One of the members of a bankrupt firm had been the guardian of his own children. The firm was indebted to the children in a large sum, for which the guardian held its notes, payable to himself as guardian, but not indorsed by him to his wards. Under these circumstances, *held*, that the children, having become *sui juris*, were competent to vote as creditors of the firm in favor of a composition proposed by it. *In re Bailey & Pond*, 222
13. One of the said children, being a married woman, voted for and signed the resolution for the composition without producing the authority of her husband therefor; but the husband afterwards made and filed an affidavit that he had given her his authority, and that her vote had his approval. *Held*, that such affidavit was both a ratification and estoppel, and made good the wife's act. *Ib.*
14. Damages for a tort are not provable against a bankrupt's estate until they have been assessed. *Ib.*
15. Unliquidated damages for a tort placed by the bankrupts on their schedule, but denied by them to be a valid claim, were properly excluded from the debts of the bankrupt estate, when it was to be ascertained whether creditors holding one-half the debts had assented to a proposed composition. *Ib.*
16. A purchase by the brother of a bankrupt and the transfer to him of a large part of the claims against the bankrupt, and the satisfaction at a large discount of other claims by the bankrupt himself for the purpose of assuring the acceptance of a composition proposed by the bankrupt, constitute no reason why the composition should not be confirmed by the court, when it was made to appear that excluding the brother and the claims held by him more than two-thirds in number, and a majority in value of the creditors had assented thereto, and that the evidence of these transactions of the bankrupt and his brother was open and accessible to the assenting creditors. *In re Walshe*, 225
17. A court of bankruptcy has all the powers of a court of chancery, and proceeds summarily untrammelled by the ordinary rules of procedure. A court of chancery may refer a matter for inquiry as to the facts at any stage of the cause, even on final hearing; therefore. *Ib.*
18. After a motion to confirm a compromise had been brought on for final hearing before the bankrupt court, the judge had the power to refer the matter back to the register to report all the facts of the case touching the proposed compromise. *Ib.*

19. The presence and vote of a creditor who is not lawfully to be accounted such, in favor of a composition, should not nullify the proceedings unless the absence of his vote would change the result. *Ib.*
20. A proceeding in the district court in the nature of a suit in equity, brought by the assignee and creditors of a bankrupt to set aside the claim of an alleged creditor, and to abrogate the lien asserted by him on the bankrupt's property, is appealable to the circuit court under section 4980 of the revised statutes. *Morris, Assignee v. Brush's Executors,* 354
21. A compliance with general order in bankruptcy XXVI, in relation to the time of filing such appeal in the circuit court, is not necessary, to give the court jurisdiction. *Ib.*
22. But the order mentioned is a rule of practice in the circuit court, and if disregarded the appellee has *prima facie* ground on which to move to dismiss the appeal. *Ib.*
23. A transcript of the proceedings of the district court is not required to be filed within the ten days prescribed for filing the appeal in the circuit court, but only a statement of appellant's claim, and a brief account of what has been done in the district court and the grounds of appeal. *Ib.*
24. Where the decree of the district court disallowing a claim against a bankrupt estate was entered on January 21st, notice of appeal given January 27th, and the appeal bond filed in the clerk's office of the district court on January 28th; and before the next term of the circuit court, but not until May 22d, the declaration of appellant, setting forth his claim and the history of the proceedings, was filed in the circuit court, at which time a transcript of the proceedings in the district court, was also filed, *held* that the circuit court had jurisdiction of the case, and could hear it or not in its discretion, according as it might or might not be satisfied with the excuse offered for the delay in filing the papers. *Ib.*
25. Advice of counsel given to debtors in failing circumstances, that unless they paid their depositors, they would be liable to a criminal prosecution under the state laws, does not take the case out of the operation of the 35th section of the bankrupt act, and make a payment to the depositors a good one. *A. & B. Strain v. Gourdin, Assignee,* 380
26. One creditor of a bankrupt may, without the consent of the assignee, intervene and oppose the allowance of the claim of another alleged creditor. *In re Joseph,* 390
27. A creditor, whose opposition to the claim of another creditor has been overruled by the district court, may, when such claim is allowed, take the question to the circuit court for review, by bill, petition, or other proper process. *Ib.*
28. Claims against a bankrupt can not, as a matter of course, be proven to bar his discharge on a date subsequent to the day fixed for the creditors to show cause against the discharge. *Hester v. Baldwin,* 433
29. One of the three individuals composing a firm was adjudicated a bankrupt. One of the other members of the firm offered as proof of a claim in his favor against the bankrupt, evidence to show that the firm of which the bankrupt had been a member was indebted in certain specified amounts which still remained unpaid, insisting that such evidence established an indebtedness from the bankrupt to him to the amount of one third of said partnership debts. *Held,* that such proof was properly rejected as not tending to establish any claim against the bankrupt in favor of his copartner, unless accompanied by proof that the copartner setting up the claim had paid said partnership debts. *Ib.*
30. The act of congress, approved March 3, 1873, prescribing what property shall be

- allowed the bankrupt, as exempt from the operation of the bankrupt law, is uniform and constitutional. *In re John W. A. Smith*, 458
31. Where the issue of bankruptcy *vel non*, is tried by a jury, the errors of the bankrupt court in the progress of the trial must be reviewed by writ of error, and cannot be reviewed by petition. *Lehman Brothers v. Strassberger*, 554
32. The bankrupt court has power to summon a jury to try the issue of bankruptcy *vel non*, during the vacation of the district court proper. *Ib.*
33. Where a judgment was a lien on the real estate of the judgment debtor, and an execution had been levied thereon, and the property advertised for sale, but before sale the judgment debtor was adjudicated a bankrupt, the sheriff, unless restrained by the bankrupt court, might well proceed to sell, and his sale would be valid. *Thames v. Miller, Assignee*, 564
34. The naked fact, that the judgment debtor had been adjudicated a bankrupt before the sale, did not of itself operate as an injunction to restrain the sale. *Ib.*
35. When, however, real estate was first seized in execution by the sheriff, long after the bankruptcy, and sold for little more than one-tenth its value, the sale was set aside, and the property turned over to the assignee. *Ib.*
36. The removal of an assignee in bankruptcy by the district court for a "cause which in its judgment renders such removal necessary or expedient," is not such a case or question as can be reviewed by the circuit court. *In re Adler & Brothers*, 571
37. The bankrupts became the lessees of premises for one year, and were adjudicated bankrupt within two months after the beginning of the term: *Held*, that rent, which accrued after the adjudication, could not be proved or allowed as a debt against the bankrupt estate. *Bailey, Assignee, v. Loeb & Brother*, 578
38. Where the law of the state gave the landlord a lien upon the goods and chattels on the demised premises to secure the rent for one year, and the lessees were adjudged bankrupt before the end of the year: *Held*, that the landlord had no lien on the goods and chattels, for rent which accrued after the bankruptcy and after the premises were surrendered. *Ib.*
39. Proceedings to put a debtor in bankruptcy should not be resorted to as proceedings *in terrorem* to collect a debt. *Sonneborn v. A. T. Stewart & Co.* 599
40. All liens, except such inchoate ones as arise upon an attachment, are protected by the bankrupt law. *Austin v. O'Reilly, Assignee*, 670
41. The right to distrain for rent does not give the landlord, strictly speaking, a lien upon the goods subject to distraint. *Ib.*
42. But such right may fairly be classed as a lien, within the intent and meaning of the bankrupt act. *Ib.*
43. In Mississippi, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent, but when the attachment is sued out, his rights are the same as those of a landlord at common law. Although the high court of errors and appeals of Mississippi has held that the landlord's right does not constitute a lien, and that a *bona fide* mortgage or sale will displace it, nevertheless, these decisions are not sufficient to deprive the landlord, in bankruptcy proceedings, of his right of priority of payment over the general creditors, out of the proceeds of goods subject at the time the proceedings in bankruptcy were commenced, to his right of attachment. *Ib.*
44. Rent accruing after bankruptcy cannot be brought in question in the bankrupt court. *Wylie v. Breck, Assignee*, 673
45. Where rent has accrued before the bankruptcy, and was secured by a lien upon the crop grown on the demised premises, and the bankrupts had col-

lected such rent from their under-tenant, the district court properly entertained jurisdiction of a petition filed by the landlord against the bankrupts and their assignees, for the purpose of following the fund bound for the satisfaction of the rent, in order to prevent the claim for rent from coming against the general estate of the bankrupts. *Ib.*

BANKS.

See NATIONAL BANKS.

BIDDINGS.

When several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property, and under this agreement it is bid off for its full value, the sale will not be set aside on account of such agreement. *Thames v. Miller, Assignee,* 564

BILL OF EXCEPTIONS.

1. A bill of exceptions which shows that the exceptions to the rulings of the court below were not taken at the trial, but were taken for the first time four days after the verdict and judgment, will not, as a matter of right, be considered by the court. *A. & R. Strain v. Gourdin, Assignee,* 380
2. A statement made by counsel for plaintiff in error of what he understood the evidence to be, on the trial of the cause in the court below, which is not made a part of the bill of exceptions, and is not verified by the signature of the judge, forms no part of the record, and no matter how formally certified by the clerk, will not as a matter of right be considered by the court on error. *Ib.*

BILL OF EXCHANGE.

1. A bill of exchange, drawn by a bank in Mobile while that city was in possession of the confederate forces, on a bank in New Orleans, after that city had surrendered to and was occupied by the federal forces, is void. *Williams, Adm'r, v. The Mobile Savings Bank,* 501
2. Such a bill is void, even though the payee of the bill, at the time he received it, supposed the city of New Orleans was still occupied by the confederate forces. *Ib.*
3. But where the payee of a bill of exchange paid therefor to the drawer the face value thereof, without knowledge of the fact that the territory where the drawee resided had fallen into possession of a government at war with the government of the drawer, and it turned out that by reason of that fact the bill was void: *Held,* that the payee was in no fault, and could recover from the drawer, on the common counts, the money paid for the bill. *Ib.*

BILL OF LADING.

A transfer of a bill of lading, as a mere collateral to previous obligations, without anything advanced, given up or lost, on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage in transitu. *Lesassier & Wise v. The Southwestern,* 35

BONDS.

See APPEAL, 7. BOTTOMRY BOND. INDORSEER, 1, 2. MORTGAGE, 3, 4. OFFICIAL BONDS, 1, 2, 3.

1. An act of the legislature, which provided for the issue of bonds by a municipal corporation, and prescribed the manner in which the tax to pay the interest thereon should be levied, and enacted safeguards to secure its levy and collection, on the faith of which legislation the bonds were sold, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact. *Maenhaut v. The City of New Orleans*, 108
2. Money collected to pay the interest on said bonds, levied, collected and set apart, according to the provisions of said act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders. *Ib.*
3. A municipal corporation being required by law to levy an annual tax to pay interest on certain designated bonds, and having levied and collected the tax for that purpose, has no right to divert the fund to other purposes, and upon application by the holders of the bonds will be enjoined from so doing. *Ranger v. The City of New Orleans*, 128
4. The charter of a municipal corporation imposed conditions and restrictions upon its power to contract debts and issue bonds. Holders of bonds, issued in pursuance of the charter, made no opposition to the issue at a subsequent date of bonds contrary to the restrictions of the charter, and the latter bonds found their way into the hands of *bona fide* holders, for value: *Held*, (a) that such irregularly issued bonds were binding on the municipal corporation; (b) that the holders of bonds regularly issued could not assail their validity. *Ib.*
5. Holders of the bonds regularly issued had no right to claim that their bonds should be paid in preference to the irregular bonds, out of moneys not specially collected for that purpose, even though the regular bonds were due and the irregular ones were not. *Ib.*
6. A railroad company executed bonds for £225 each, if payable in London, or for \$1,000 each, if payable in New York or New Orleans, and with coupons attached, by each of which the company promised to pay £9, if payable in London, or \$40, if payable in New York or New Orleans, and the bonds declared that the president of the company was authorized by his indorsement to fix the place for the payment of both the principal and interest of the bonds. The bonds were indorsed as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in —," and the indorsement was signed with the genuine signature of the president. *Held*, (a) That while in this condition, the bonds were not negotiable instruments. (b) That if such bonds were stolen from the company, and passed into the hands of *bona fide* holders for value, such holders would have no authority to fill the blank left in the indorsement and thus fix the place of payment, but would hold the bonds subject to any defect of title arising from the manner in which they were put in circulation. *Jackson v. The Vicksburg, Shreveport & Texas Railroad Co.*, 141
7. The charter of a bank authorized it to construct water-works for the city of New Orleans, and declared that after the expiration of thirty-five years, it should be lawful for the city to purchase said water-works on certain prescribed terms, and pay for them in its bonds, and the bank was, on the election of the city to purchase, required to sell on the terms prescribed: *Held*, that this charter was a contract with the bank and that any act of the legislature afterwards passed imposing onerous conditions upon the issue of bonds by the city, so far as they might apply to bonds to be issued in payment for the water-works, impaired the obligation of the contract with the bank and was void. *Sala v. The City of New Orleans*, 188

8. Where the contract for the purchase of the water-works was executed and the city got the water-works and paid its bonds to the bank therefor, and the city did not deny its obligation to pay the bonds, nor threaten to do so, the bank could not repudiate the contract of sale on account of any supposed infinity in the bonds. *Id.*
9. The city having authority to issue the bonds, they are good in the hands of *bona fide* holders for value, whether the conditions precedent to their issue were observed by the city or not. *Id.*
10. The ownership of the bonds issued in payment for the water-works did not make the holders thereof stockholders in the bank from which the water-works were purchased. *Id.*
11. A city was authorized by its charter to exact the cost of sidewalk improvements from the owners of abutting lots to be collected by assessments on the property; to raise money for general and special purposes by taxation; and to issue bonds for a single purpose which was not sidewalk improvements: *Held*, that these provisions of the charter excluded the power to issue negotiable coupon bonds to pay for sidewalk improvements. *Hitchcock & Co. v. The City of Galveston*, 272
12. A state indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien on all the property of the company; and that upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale: *Held*, that at the suit of a holder of bonds of a subsequent issue, which the state had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the state, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the state, nor appoint a receiver therefor. *Branch v. The Macon & Brunswick Railroad Co.* 385
13. A purchaser of railroad bonds is bound to take notice of what appears upon the face of his bonds, and of the mortgage made to secure them. *Stanton et al., Trustees, v. The Alabama & Chattanooga Railroad Co.* 523
14. But if the bonds and mortgage, which put the purchaser on inquiry, full and satisfy inquiry, he is bound to look no further. *Id.*
15. A railroad company executed a mortgage to secure a series of numbered bonds, all bearing the same date and payable at the same time, not to exceed sixteen bonds of one thousand dollars each to the mile of its road. Five hundred bonds in, excess of this limit, purporting to be secured by this mortgage, were issued by the company and sold for value to *bona fide* holders. *Held*, (a) That bonds of this kind are numbered, not for the purpose of giving one number an advantage over another, but simply for convenience in registration and identification. (b) In such a case, the five hundred bonds bearing the highest numbers stand on the same footing as those bearing the lower numbers; and when the mortgaged property is inadequate to pay, all are entitled to share *pro rata* with the others in its proceeds. *Id.*
16. When a county issues bonds payable to bearer, and pledges for their payment the faith, credit and property of the county under authority of an act of the legislature referred to on the face of the bonds by title and date, and these bonds pass *bona fide* into the hands of the holders for value, the county is bound to pay them. *Smith v. Tallapoosa County*. 574
17. A county, under authority of an act of the legislature, issued its bonds, payable to bearer at a future day, and after their issue, and long before their maturity, the supreme court of the state declared the law authorizing the issue to be constitutional. *Held*, that all persons to whose hands the bonds might come might consider that question as conclusively settled; it could not be reopened to their damage. *Id.*

18. A municipal corporation, without authority of law, subscribed for stock in a plankroad company, and issued its negotiable securities in payment thereof. *Held*, that it was not estopped by the resolutions of the city council, the acts of its officers, or by the negotiable form or other matter appearing upon the face of the bonds, from denying the authority of its officers to pledge the faith of the city in aid of the said road, or to issue the said bonds. *Chisholm v. The City of Montgomery*. 584
19. The fact that plaintiffs are *bona fide* holders of bonds issued by a municipal corporation is not a good reply to a plea setting up the want of power in the corporation to issue them. *Ib.*
20. An act of the legislature authorized the governor to indorse in behalf of the state the first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his indorsement as the authority therefor: *Held*, (a) That the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold. (b) That *bona fide* holders for value, of the bonds indorsed by the governor assuming to act under said authority, were not to be charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds. *Young v. The Montgomery & Eufaula Railroad Co.* 606
21. An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that the law did not pass the legislature by the vote required by the constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds: *Held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything. *Ib.*
22. Where an act of the legislature authorized the mayor and aldermen of a city, "with the consent of a majority of the corporation comprising said city," to subscribe money to any railroad leading from the city, and to borrow money to pay the same: *Held*, that there was thereby conferred upon the municipal officers power to issue bonds to pay the subscription. *Milner's Administrator v. The City of Pensacola*. 632
23. Under authority of such a law, the mayor and aldermen of the city of Pensacola subscribed a large sum to aid the construction of a railroad from the city of Pensacola, and, in payment thereof, issued negotiable bonds payable to bearer in twenty years, which, on their face, stated that they were issued in conformity with the law. In a suit brought by an innocent holder for value on the coupons belonging to said bonds, it was *held* to be no defense to the action; that at the election to obtain the "consent of a majority of the corporation comprising said city" to such subscription, only a minority of the citizens voted; nor that the question submitted to the citizens was whether the subscription should be made to construct a railroad from Pensacola to Montgomery, and the subscription was actually made to construct a railroad from Pensacola to the state line. *Ib.*

BOTTOMRY BOND.

See ADMIRALTY, 2. INTEREST, 1, 2, 3.

BROWNSVILLE.

See MUNICIPAL CORPORATIONS, 16.

CAPTURED AND ABANDONED PROPERTY.

1. Property cannot be considered "abandoned," in the sense in which the word is used in the act of congress (13 Stat., 375, sec. 1), unless the owner was voluntarily absent, and engaged either in arms or otherwise in aiding or encouraging the rebellion. *Kimball v. Taylor.* 37
2. During the late war between the United States and the insurgent states, a quantity of cotton was seized in one of the insurgent states by an officer of the government, under authority of the captured and abandoned property act, was sold, and its proceeds paid into the treasury. Held, that the question whether or not the cotton was in fact captured or abandoned property was not open to litigation in the courts. *Chamberlain v. Stanton.* 164
3. When parties not entitled to said proceeds, within two years after the suppression of the rebellion, brought a fraudulent suit in the court of claims to recover the same from the United States, and, by means of false allegations, false testimony and fraud, recovered judgment and received said proceeds from the treasury, a bill filed by the real owners against such persons, more than two years after the suppression of the rebellion, praying for a decree against them for the amount of said proceeds, was dismissed on demurrer for want of equity. 1b.

CARELESSNESS.

See NEGLIGENCE, 1, 2.

CASES CONSIDERED, Etc.

See MANDAMUS, 6.

CHATTEL MORTGAGE.

See MORTGAGE, 8, 9.

CHECK.

See PAYMENTS, 1.

CITATION.

1. That provision of the constitution of the state of Louisiana which requires the style of process to be, "The State of Louisiana," does not apply to citations. *Kimball v. Taylor.* 37
2. Under the practice of the clerks of the state courts of Louisiana, the absence of a seal from a citation in the copy of a record is no proof that the original citation was without seal. 1b.
3. Service of an irregular or erroneous summons or citation is not void, when the service is personal. 1b.

COLLISION.

See INSURANCE, 3.

1. A neglect to keep a proper look out, which does not in any way contribute to a collision, cannot be alleged as a ground on which to recover damages caused by the collision. *Shirley v. The Richmond.* 58

2. A neglect of the well established rule, for navigating the Mississippi river, that ascending boats shall run the points, and descending boats the bends, which results in a collision and loss, renders the boat which disregards the rule liable for the damages. *Ib.*

COMBINATION.

See PATENTS, 1, 2.

COMMISSIONERS.

Commissioners of the circuit courts of the United States have not, by statute, any power to issue writs of attachment returnable to said courts. *Chittenden & Co. v. Darden & Holston.* 437

COMPOSITION.

1. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the court, the bankrupt is thereby discharged only from the claims of the creditors whose names, addresses and debts are placed on the statement produced at the meeting of creditors. *In re Becket,* 173
2. In such a case, no discharge granted by the court is necessary or proper. *Ib.*
3. One of the members of a bankrupt firm had been the guardian of his own children. The firm was indebted to the children in a large sum, for which the guardian held its notes, payable to himself as guardian, but not indorsed by him to his wards. Under these circumstances, *held,* that the children, having become *sui juris*, were competent to vote as creditors of the firm in favor of a composition proposed by it. *In re Bailey & Pond,* 222
4. Unliquidated damages for a tort placed by the bankrupts on their schedule, but denied by them to be a valid claim, were properly excluded from the debts of the bankrupt estate, when it was to be ascertained whether creditors holding one-half the debts had assented to a proposed composition, *Ib.*
5. A purchase by the brother of a bankrupt and the transfer to him of a large part of the claims against the bankrupt, and the satisfaction at a large discount of other claims by the bankrupt himself for the purpose of assuring the acceptance of a composition proposed by the bankrupt, constitute no reason why the composition should not be confirmed by the court, when it was made to appear that excluding the brother and the claims held by him, more than two-thirds in number, and a majority in value of the creditors had assented thereto, and that the evidence of these transactions of the bankrupt and his brother was open and accessible to the assenting creditors. *In re Walsh,* 225
6. After a motion to confirm a compromise had been brought on for final hearing before the bankrupt court, the judge had the power to refer the matter back to the register to report all the facts of the case touching the proposed compromise. *Ib.*
7. The presence and vote of a creditor who is not lawfully to be accounted such, in favor of a composition, should not nullify the proceedings unless the absence of his vote would change the result. *Ib.*

COMPOUNDING FELONY.

Where A. is justly indebted to B., and B. threatens A. with a criminal prosecution if A. does not secure the debt, which, in justice, A. ought to do, and

A. gives a mortgage, the mortgage is not void on the ground that it was executed to compound a felony. *Plant v. Gunn*, 372

CONDITION PRECEDENT.

See CONTRACTS, 10.

CONSTITUTIONAL LAW.

See PRACTICE IN EQUITY, 4, 7.

1. That provision of the constitution of the state of Louisiana which requires the style of process to be, "The State of Louisiana," does not apply to citations. *Kimball v. Taylor*, 37
2. An act of the legislature of a state authorized the issue of fifteen millions of dollars in new consolidated bonds, to be exchanged for old bonds of the state, at the rate of sixty cents of consolidated bonds for one dollar of the old bonds, and declared that the consolidated bonds should be used for no other purpose than to take up the old bonds on the terms aforesaid, and levied an annual tax for the payment of the principal and interest of the consolidated bonds, and declared that every provision of the act should be considered a contract between the state and the holders of consolidated bonds, and the terms of the act were accepted by many holders of old bonds, and the exchange of bonds made: *Held*, that a subsequent act of the legislature which authorized the payment of consolidated bonds to general creditors of the state, dollar for dollar, was a violation of said legislative contract with the holders of the consolidated bonds, and was null and void. *McComb v. The Board of Liquidation*, 48
3. A bill in equity brought in a United States court by the holder of such consolidated bonds against certain state officers to enjoin them from issuing consolidated bonds to the general creditors of the state, dollar for dollar, is not a suit against the state, and is not prohibited by the eleventh amendment of the constitution of the United States. *Id.*
4. The courts of the United States may entertain such a suit, and restrain the state officers from violating, under color of a void and unconstitutional law, the contract of the state with the complainants. *Id.*
5. The act of the legislature of Louisiana of February 23, 1852, establishing the charter of the city of New Orleans, which declares that the rate per cent. of the tax (to pay interest on the consolidated debt) in each municipality shall be in proportion to the indebtedness of each, is not in conflict with article CXXVII of the constitution of 1845, which declares that "taxation shall be equal and uniform throughout the state." *Maenhaut v. The City of New Orleans*, 108
6. The charter of a bank authorized it to construct water-works for the city of New Orleans, and declared that after the expiration of thirty-five years, it should be lawful for the city to purchase said water-works on certain prescribed terms, and pay for them in its bonds, and the bank was, on the election of the city to purchase, required to sell on the terms prescribed: *Held* that this charter was a contract with the bank and that any act of the legislature afterwards passed imposing onerous conditions upon the issue of bonds by the city, so far as they might apply to bonds to be issued in payment for the water-works, impaired the obligation of the contract with the bank and was void. *Sala v. The City of New Orleans*, 188
7. A railroad company executed a first mortgage on its line of road to secure a large number of its bonds. The mortgage contained a clause declaring that whenever the company should procure from the state a loan of six thousand dollars per mile out of the school fund, to which it would be by law entitled

on the performance of certain conditions, and which it was the declared intention of the company to obtain, and should execute to the state its bonds therefor, said bonds should constitute a lien upon the property mortgaged, superior to the lien of said first mortgage. Forty miles of the road remained to be completed, for which no loan from the state had been received. The legislature then passed an act authorizing the company to make a mortgage to secure bonds to the amount of \$6,000 per mile upon this uncompleted portion of its road, which should be prior to the said first mortgage, provided the company would relinquish all claims to the state loan for that portion of its road. This mortgage was executed accordingly, and the bonds secured thereby, sold. *Held*, that the act of the legislature authorizing this proceeding on the part of the railroad company did not invade any substantial and vested rights, and was therefore valid and binding. *Campbell v. The Texas & New Orleans Railroad Co.*, 263

8. The bonds to be given the state for the loan of the school fund were to run ten years, and a sinking fund was to be provided for their payment; the bonds which were authorized in their stead were to run fifteen years, and no sinking fund was required to be set apart for their payment. *Held*, that these circumstances were not of the essence of the contract, and that the legislation authorizing these changes did not impair the obligation of the contract contained in the original first mortgage. *Ib.*
9. The bonds to be given for the state loan were to bear six per cent. interest; the bonds authorized in their stead, bore eight per cent. interest. *Held*, that the addition of two per cent. to the interest of the substituted bonds was to that extent an invasion of the rights of the holders of bonds under the original first mortgage, who had the right to claim that bonds at the rate of \$6,000 per mile only, and bearing only six per cent. interest, should be made superior to theirs. *Ib.*
10. The right to make inspection laws is not granted to congress, but is reserved to the states; nevertheless, it is subject to the paramount right of congress to regulate commerce with foreign nations and among the several states. *Neilson v. Garza*, 287
11. If any state, as a means of executing its inspection laws, imposes any duty or impost on imports or exports, such duty or impost is void if it exceeds what is absolutely necessary for executing such inspection laws. *Ib.*
12. As the article of the constitution of the United States which prescribes the limit within which inspection charges shall be kept, goes on to provide that "all such laws shall be subject to the revision and control of congress," congress is the proper authority to decide whether a charge or duty is or is not excessive. *Ib.*
13. Therefore if a law passed by a state is really an inspection law, it must stand until congress sees fit to alter it, even though the fee allowed by it is in effect an impost or duty on imports or exports. *Ib.*
14. The act of the legislature of Texas, approved October 14, 1871, and the further act approved March 23, 1874, entitled "for the encouragement of stock raising and the protection of stock raisers," are inspection laws and are constitutional. *Ib.*
15. The act of congress, approved March 3, 1873, prescribing what property shall be allowed the bankrupt, as exempt from the operation of the bankrupt law, is uniform and constitutional. *In re John W. A. Smith*, 458
16. The act of the legislature of Texas, of February 2, 1860, which gave a right of action for damages to the surviving husband, wife, child, children, or parents of any person whose life was lost by the negligence or carelessness of the proprietors, etc., of any railroad, steamboat, etc., entitled the plaintiff to recover compensatory damages only. Said act is not abrogated by section 30 of the constitution of Texas of 1869, which makes "every person, corporation, etc., that may commit a homicide through willful act or omission, responsible in exemplary damages to the surviving husband, widow, heirs, of

- his or her body, or such of them as there may be, separately and consecutively." *Gohen v. Texas Pacific Railroad Company*, 345
17. It is not within the power of a legislature, by a repeal of the charter of a municipal corporation, to invade the rights of its creditors and cancel its indebtedness. Such legislation impairs the obligation of contracts and is unconstitutional. *Milner's Administrator v. The City of Pensacola*, 632
 18. The section of an act of a state legislature which purported to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the state, is in conflict with the act of congress approved July 22, 1866, entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes;" and the section conferring such exclusive right is therefore null and void. *The Pensacola Telegraph Co. v. The Western Union Telegraph Co.*, 641
 19. Congress has the constitutional power to pass an act giving to telegraph companies, organized under state laws, the right to construct and use lines of telegraph along any of the military or post roads of the United States. 1.
 20. The constitution of the state of Florida of 1868, reserves to each head of a family free from the claims of creditors, a homestead without limit as to its value, of 160 acres, when the same is not in an incorporated city or town; *Held*,
 - (a) That the purpose of this provision was to preserve to the debtor, not only his shelter, but his usual means of employment for the support of his family.
 - (b) In the case of a farmer the exemption embraces his house and farm not exceeding the number of acres limited, together with the improvements thereon.
 - (c) But a farmer's homestead would not embrace tenant houses, a saw-mill, gristmill or fulling mill, though erected on a portion of the tract of which the farm is a part.
 - (d) A mill owner, who has a farm attached to his mill and cultivates it as a secondary business, could hold his residence and mill exempt, but not the farm also.
 - (e) The owner of a sawmill who followed the business of sawing lumber, lumber, and whose mill was adjacent to his residence, would be entitled to hold the same as part of his homestead.
 - (f) But he could not retain as a part of his homestead those portions of the 160 acres of land which are not ancillary to his business as a lumberman. *Greeley, Assignee, v. Scott and Wife*, 657

CONSTRUCTIVE NOTICE.

See NOTICE, 1, 2.

CONTRACTS.

See CONSTITUTIONAL LAW, 2, 4, 7, 8, 9.

1. Where the Commercial Bank of New Orleans entered into a contract with the city of New Orleans for the sale to the latter of the water-works, and the contract was executed and the city got the water-works and paid its bonds to the bank therefor, and the city did not deny its obligation to pay the bonds, nor threaten to do so, the bank could not repudiate the contract of sale on account of any supposed infirmity in the bonds. *Sala v. The City of New Orleans*, 188
2. The city having authority to issue bonds, they are good in the hands of bona fide holders for value, whether the conditions precedent to their issue were observed by the city or not. *Id.*

3. Therefore, parties holding only a portion of the bonds issued by the city in payment for the water-works could not undertake to repudiate the contract of sale without the consent of all the other holders of such bonds. *Ib.*
4. If a debtor in embarrassed circumstances enters into an arrangement with all his creditors to pay them a certain proportion of their claims, in consideration of a discharge of their demands, and he privately agrees to give a better or further security to one than to the others, the contract with the other creditors is void. *Chuck & Brother v. Mesritz,* 204
5. Where charges of fraud and misrepresentation in procuring a contract, which has been partly performed, are made as the ground for setting it aside, and where a rescission would involve the upsetting of many large and important transactions, the proof should be made clear to justify a court in making the decree prayed for. *Morgan v. The New Orleans, Mobile & Texas Railroad Co.,* 244
6. As a general rule a contract is to be governed as to its interpretation, nature, obligation, performance or dissolution, by the law of the place where it was made. *Ib.*
7. The principal exception to this rule is where the contract is made in one state or sovereignty, to be performed in another; in that case it is to be governed by the law of the place of performance. *Ib.*
8. But where a contract is made in one state, to be partly performed there, and partly performed in several other states, the contract is to be governed by the law of the place where it is made. *Ib.*
9. But in such a case where, in the performance of the contract, conveyances and transfers are to be made of property situate in several states, consisting of realty or other property subject to the local law, the conveyances and transfers should be made in accordance with the *lex rei sitæ*. *Ib.*
10. Parties entered into a contract with the city council of Galveston, whereby they agreed to fill, grade, tamp, roll, and curb certain specified sidewalks, and to lay down and fabricate thereon an asphalt pavement, and to obtain the written consent of the owners of lots abutting on said pavements, to the laying of said asphalt pavement. Without obtaining such consent, the contractors proceeded to fill, grade, etc., the sidewalks, but before completing the work preparatory to the laying of the pavement, they were forbidden by the city authorities from going on with the work, and the contract was repudiated by the city. In a suit brought by the contractors to recover for the work actually done, and also damages for the breach of the contract by the city, *held*, that the contract was entire; that the obtaining of the consent of the property holders to the pavement named was a condition precedent, to be performed before any work was done, and there could be no recovery in the action unless it was averred and shown that such consent had been obtained. *Hitchcock & Co. v. The City of Galveston,* 272
11. A contract will not be avoided on account of duress by imprisonment, unless the imprisonment was unlawful, and the contract was made during the imprisonment, and in consideration of release therefrom. *Plant v. Gunn,* 372
12. The fact that a vessel is not a common carrier does not relieve her from the warranty implied in a contract of affreightment, that she is sound, staunch and seaworthy. *The Planter,* 490
13. Where A. through a factor makes a contract with B. for the purchase or sale of cotton for future delivery, intending that there should be no delivery, but that the contract should be performed by the payment of differences, but this purpose is not shown to be also the purpose of B.: *Held*, that a note given by A. to the factor for money advanced by him to pay losses on such contracts, and for his commissions in making the same, was a valid and binding obligation. *Lehman Brothers v. Strassberger,* 554

CORPORATIONS.

See MUNICIPAL CORPORATIONS. NATIONAL BANKS, 4, 5, 6, 7, 8.

1. The property of a seminary of learning which is a public corporation under the control of officers appointed by the state, and managed in the manner prescribed by law, and all whose property has been received either from the state directly, or has been granted by congress to the state for educational purposes, and which is required to educate free a certain number of students to be named by the governor, cannot be taken in execution on a judgment recovered against it. *Featherman v. The Louisiana State Seminary*, 71
2. The ownership of stock in an incorporated company does not give the stockholders any title to the property of the company. *Sala v. The City of New Orleans*, 188
3. The city of New Orleans purchased water-works of the Commercial Bank and paid therefor its bonds, which the bank distributed among its stockholders, who sold them to others. Held, that the ownership of said bonds did not make the holders thereof stockholders in the bank from which the water-works were purchased. *Ib.*
4. A commercial or other business corporation is constituted so as to do business in a corporate name, and in a capacity totally distinct from that of any or all of its members considered as individuals. *Forbes v. The Memphis, El Paso & Pacific Railroad Co.*, 323
5. Such a corporation is a person; its property is not the property of its stockholders, nor are its rights their rights. *Ib.*
6. The rights of a stockholder in such a corporation are to attend stockholders' meetings, to participate in the profits of the business, and to require that the corporate property and funds shall not be diverted from their original purposes, and if the company becomes insolvent, to have its property applied to the payment of its debts. *Ib.*
7. For the invasion of these rights by the officers of the company, a stockholder may sue at law or in equity, according to the nature of the case. *Ib.*
8. All remedies for injuries to the property or rights of such a corporate body must be prosecuted in the name of the company; all demands against the company must be prosecuted against it by name. *Ib.*
9. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice the interests of the corporation, a stockholder may, for such breach of trust and conspiracy, call the guilty parties to an account in a court of equity. *Ib.*
10. Two states may, by concurrent legislation, unite in creating the same corporate body. *Wilmer v. The Atlanta & Richmond Air Line Railway Co.*, 409
11. A corporate body may exercise its functions in a foreign territory upon such conditions as may be prescribed by the law of the place. *Knott v. The Southern Life Insurance Co.*, 479
12. A foreign corporation may be "found" in the sense in which that word is used in the judiciary act in a state other than that by whose law it was created. *Ib.*
13. A private corporation is liable in an action for malicious prosecution. *Copley v. The Grover & Baker Sewing Machine Co.*, 494

COTTON PRESSES.

See PATENTS, 3, 4.

COUPONS.

See NEGOTIABLE INSTRUMENTS.

CREDITOR'S BILL.

See PRACTICE IN EQUITY, 11. RES JUDICATA, 2.

CRIMINAL PRACTICE.

1. The federal courts on questions of criminal practice, not regulated by act of congress, are governed by the common law. *The United States v. Hammond*, 197
2. Perjury committed in the course of a judicial investigation, conducted under authority of acts of congress, is an offense against the public justice of the United States, and is exclusively cognizable in the courts of the United States. *Ex parte Dock Bridges*, 428

DAMAGES.

See COLLISION, 1, 2. CONSTITUTIONAL LAW, 15. INSURANCE, 1, 2, 3, 4. STATUTES CONSTRUED, 22.

1. Damages for a tort are not provable against a bankrupt's estate until they have been assessed. *In re Bailey & Pond*, 222
2. The rule for the measure of damages in actions for *mesne* profits is the fair rental value of the property. *Campbell, Adm'r, v. Brown*, 349
3. If the fair rental value cannot be ascertained, then the rule of damages would be the fair actual value of the property while in possession of the defendant, if prudently and judiciously managed. *Ib.*
4. No recovery can be had for profits accruing after the commencement of the action for *mesne* profits. *Ib.*
5. In an action for the malicious prosecution of a proceeding to have the plaintiff declared a bankrupt in order to a recovery of exemplary damages, the plaintiff must show actual malice, that is, that the defendants willfully instituted and carried on the bankruptcy proceedings when they knew there was no ground therefor. *Sonneborn v. A. T. Stewart & Co.*, 599
6. Where it had been adjudicated by the highest court of law in the state, that the petitioner had no claim against the party whom he sought to put in bankruptcy, and the bankrupt court had refused to make a decree adjudicating the alleged debtor a bankrupt, in an action for malicious prosecution, the latter was, beyond question, entitled to recover the damages he had sustained by the unlawful attempt to put him in bankruptcy. *Ib.*
7. In such a case, the measure of damages stated. *Ib.*
8. If the defendants had reason to believe that the plaintiff was indebted to them, and had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damage for instituting a proceeding to put the plaintiff in bankruptcy. *Ib.*

DEBTOR.

See CONTRACTS, 4.

DEBTOR AND CREDITOR.

See PAYMENTS, 1, 2.

DEFAULT.

A default was set aside and judgment opened where defendant, by affidavit, excused his neglect in not making defense, and made it appear that he had a good defense, and offered to pay costs and plead *instanter*; the motion to set aside the default having been made at the term at which the judgment was rendered, and continued several terms without fault of defendant. *Hand v. The Yahoola Mining Company*, 407

DELIVERY.

Where the captain of a ship having goods on board was requested by the consignee to deliver them at once, and replied that he would begin discharging them at 12 o'clock noon, or soon after, and did so, and gave notice thereof to the consignee, who said his clerk would attend to them and take care that they were all removed from the wharf, and the clerk neglected to employ drays sufficient to carry off the goods before night, and a portion of them were left on the wharf during the night, and the captain of the ship piled them up and covered them with tarpaulins, and placed a watchman over them, and the ship's agent had general orders from the consignee not to store his goods: *Held*, that there was a good delivery of the goods, and the ship was not liable for damage done them by rain during the night. *Ellsworth v. The Bark Wild Hunter*, 315

DEPOSITS.

See MUNICIPAL CORPORATIONS, 2, 3. STATUTES CONSTRUED, 1.

DISTILLER.

See STATUTES CONSTRUED, 4.

DISTRICT JUDGE.

A district judge sitting in the circuit court may in a proper case enlarge the time for filing an appeal in the circuit court. *Morris, Assignee, v. Brush's Executors*, 354

DOMICILE.

See JUDGMENT, 1. PARTNERS, 1, 2.

DURESS.

1. A contract will not be avoided on account of duress by imprisonment, unless the imprisonment was unlawful, and the contract was made during the imprisonment, and in consideration of release therefrom. *Plant v. Gunn*, 372
2. Under the code of Georgia, the threat of a criminal prosecution is not such duress as would avoid a contract. *Id.*

EQUITY.

See CAPTURED AND ABANDONED PROPERTY, 3. PRACTICE IN EQUITY..

1. A bill which charges that the defendant, through fraudulent practices, had secured the transfer to his own name of shares of stock in an incorporated company, to which the complainant held the equitable title, and prayed that the complainant might be declared the owner of the stock, presents a good case for the intervention of a court of equity. *Kilgour v. The New Orleans Gas Light Company*, 144
2. In such a case there is no adequate relief at law. *Ib.*
3. An alternative prayer does not necessarily make a bill multifarious. *Ib.*
4. If process is prayed against all the necessary parties to a bill, a demurrer to the bill for want of proper parties will not lie, on the ground that some have not been served with process. *Ib.*
5. A mortgage on real estate to secure a debt executed by public act according to the law of Louisiana, although it imports confession of judgment, may be enforced by suit in equity. *Benjamin v. Cavaroc*, 168
6. The fact that there is a statutory remedy in Louisiana on such a mortgage does not oust the jurisdiction of a court of equity to enforce it. *Ib.*
7. Where, under the jurisprudence and laws of a state, want of privity is not an obstacle to the enforcement by one person of a contract made for his benefit by another person with a third person: *Held*, that the equity courts of the United States, sitting in such state, will enforce such a contract at the suit of the beneficiary. *Ib.*
8. When a court of equity was called on for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a nonresident naked trustee, and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible. *Ketchum v. The Mobile & Ohio Railroad Co.*, 532
9. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise. *Ib.*
10. Such a trustee who, soon after the cessation of hostilities, learns that he has been removed and another appointed in his stead, and who for a period of ten years thereafter makes no claim to his trusteeship, and does no act as trustee, will be held to have abandoned his title to the office, and to have acquiesced in the appointment of his successor. *Ib.*
11. Long acquiescence in a particular grievance without effort to redress it is a complete bar to relief in equity. *Ib.*
12. The president and directors of a railroad company had contracted a floating debt to pay interest on its bonds, and for supplies and repairs for which certain persons interested in the road had become individually liable: *Held*, in a suit in equity brought by the trustees of the first mortgage on the railroad property, to foreclose the same, that the court had no power without the consent of the bondholders to direct the application of the income of the road to the payment of the floating debt, although it was made to appear that it could be paid on favorable terms, and that it was equitable and probably for the interest of the bondholders that such application should be made. *Duncan and Elliott, Trustees, v. The Mobile & Ohio Railroad Co.*, 542
13. A state indorsed the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property: *Held*, that the fact that the state could not be sued was

no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state and have the benefit of the security. *Young v. The Montgomery & Eufaula Railroad Co.*, 606

14. An attorney for trustees charged with a public trust, or one of such trustees acting as attorney for the others, has not the implied power to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. *Voss v. The Trustees of the Internal Improvement Fund of Florida*, 647

ESTOPPEL.

See MARRIED WOMEN, 4.

- A. pleaded to an action at law a matter which the court held to be a good defense, whereupon the suit was dismissed; but it was afterwards decided in another suit between other parties, by the court of last resort, that the defense so set up was not good: *Held*, that in a second action brought against A. for the same cause, he was not estopped by reason of his plea in the former case from setting up the statute of limitations as a defense, even though the bar of the statute had intervened since the dismissal of the first action. *Turner v. Edwards*, 435

EVIDENCE.

1. Where the title of the plaintiff who seeks to disturb the possession of others depends on the fact that the person under whom he claims survived another, though both perished in the same event, and the case admits of no presumptions of law, the burden of proof is on the plaintiff to establish the fact of survivorship. If it appear that both persons perished at the same instant, or if it shall be impossible to declare from the evidence which perished first, the plaintiff must fail. *Robinson v. Gallier*, 178
2. But the fact of such survivorship does not require any higher degree of proof than other facts in a civil case. *Id.*
3. Photographic copies of public documents on file in the departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way, by proof of handwriting. *Leathers v. The Saloor Wrecking Co.*, 680

EXCEPTIONS TO MASTER'S REPORT.

See PRACTICE IN EQUITY, 32.

EXECUTION.

See CORPORATIONS, 1.

EXECUTOR.

See TRUSTEE.

EXEMPTIONS.

See BANKRUPTCY, 30. HOMESTEAD.

EXPROPRIATION.

1. The decree of the congress of the state of Tamaulipas, of October 15, 1827, and the proceedings thereunder, did not divest the title of the owners of the land taken for the ejidos of the city of Matamoras, nor transfer their title to the city; nor was it an adjudication *in rem* for the expropriation of said lands without compensation, reserving to the owner the right to obtain compensation by applying therefor. The title could not be divested without compensation to the owners. *The City of Brownsville v. Cavazos*, 293
2. Expropriation is a seizure of so much of the private owner's property as is necessary for the public use. When the public purpose is accomplished, or has ceased to exist, the residue of the property belongs to the original owner. *Ib.*
3. But this reverter must be subject to any *bona fide* rights that may have lawfully accrued in the meantime; thus when citizens have acquired a right of perpetual occupancy of the expropriated lands, at a certain rent or any higher degree of title, they could not be deprived of it. *Ib.*

FLOATING DEBT.

See EQUITY, 12.

FLORIDA.

See PRACTICE IN EQUITY, 56. STATUTES CONSTRUED, 28.

FRAUD.

See CONTRACTS, 4, 5.

FRAUDULENT CONVEYANCES.

1. As a general rule, a voluntary conveyance, made by a grantor in easy circumstances and in no pecuniary strait, to his wife or children, cannot be impeached, because voluntary, at the instance of creditors who became such long after the execution of the conveyance. *Barker v. Barker's Assignee*, 87
2. To impeach a conveyance made under such circumstances, it must be shown to have been fraudulent, or made with a view to protect the property conveyed from future debts. *Ib.*
3. A deed not at first fraudulent may become so by being concealed from the public, so that the grantor gets credit by reason of his supposed ownership of the property conveyed. *Ib.*
4. The Code of Louisiana gives no effect to an unregistered act of alienation as against *bona fide* purchasers or creditors. *Ib.*
5. But a general creditor of the grantor cannot proceed to set aside a conveyance, either really or constructively fraudulent, unless he has a lien on the property conveyed, or has reduced his claim to judgment. *Ib.*
6. But this rule does not apply to an assignee in bankruptcy. The adjudication of bankruptcy arrests the proceedings of creditors to obtain judgments. The assignee may therefore proceed to impeach a deed of the bankrupt as fraudulent, although the creditors have not reduced their claims to judgment, and although they have no specific lien upon the property conveyed. *Ib.*

7. It is an indispensable prerequisite to a creditor's bill which seeks to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, that the claim should first have been reduced to judgment. *Stewart v. Fagan*, 215

GEORGIA.

See AMENDMENT. DURESS, 2. MORTGAGE, 9. RECORDS.

HABEAS CORPUS.

1. As a general rule of the common law, when it appears by the return to a writ of *habeas corpus*, that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after conviction, he will be at once returned to custody. *Ex parte Dock Bridges*, 428
2. But this rule has been modified by several acts of congress, which are condensed into sec. 753, Rev Stat., whereby the courts of the United States are authorized to issue the writ in behalf of any person restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States. *Ib.*
3. Therefore, a person who had been convicted in a state court for the offense of perjury committed in the course of a judicial investigation held under authority of acts of congress, and was undergoing imprisonment in the penitentiary therefor, was discharged on *habeas corpus* issued from a court of the United States. *Ib.*

HOMESTEAD.

The constitution of the state of Florida of 1868 reserves to each head of a family free from the claims of creditors, a homestead, without limit as to its value, of 160 acres, when the same is not in an incorporated city or town: *Held*,

a. That the purpose of this provision was to preserve to the debtor, not only his shelter, but his usual means of employment for the support of his family.

b. In the case of a farmer, the exemption embraces his house and farm, not exceeding the number of acres limited, together with the improvements thereon.

c. But a farmer's homestead would not embrace tenant houses, a sawmill, gristmill, or fullingmill, though erected on a portion of the tract of which the farm is a part.

d. A mill owner, who has a farm attached to his mill and cultivates it as a secondary business, could hold his residence and mill exempt, but not the farm also.

e. The owner of a sawmill who followed the business of sawing lumber, and whose mill was adjacent to his residence, would be entitled to hold the same as part of his homestead.

f. But he could not retain as a part of his homestead those portions of the 160 acres of land which were not ancillary to his business as a lumberman. *Greeley, Assignee, v. Scott and wife*, 657

HUSBAND AND WIFE.

See MARRIED WOMEN, 3, 4, 5, 6, 7.

IMPROVEMENTS.

Under the jurisprudence of Louisiana, a possessor in bad faith is entitled to compensation for improvements and betterments put upon the land by him which have been accepted by the owner, together with interest on the amount expended therefor, and is chargeable with the rents and profits with interest. *Jackson v. Ludeling*, 254

INDORSEMENT.

See BONDS, 6.

INDORSER.

1. A railroad company is bound as indorser of a negotiable bond issued by a municipal corporation, payable to the railroad company or assigns in twenty years, which the company has transferred by indorsement; the municipal corporation having failed to pay on demand at maturity, and the proper steps having been taken to charge the company as indorser. *Bonner v. The City of New Orleans*, 135
2. To charge an indorser, the certificate of the notary need not show that notice of demand and nonpayment was served on the indorser during business hours of the day after demand. If notice was served at any time during that day, it is sufficient. *Id.*

INFRINGEMENT.

See PATENTS, 1, 2.

INJUNCTION.

See BANKRUPTCY, 34, 35. JURISDICTION, 3, 5. MANDAMUS, 6. MUNICIPAL CORPORATIONS, 6, 7, 8. PRACTICE IN EQUITY, 5, 6, 20, 44, 45. TAXATION, 4.

INSCRIPTION.

1. The records in the recorder's office of the parish of Rapides having been destroyed by fire, an act of the legislature was passed providing for reestablishing said records by proceedings before the district judge of the parish. *Held*, that the inscription, in the proper office, of a decree of said judge reestablishing a mortgage, the record of which had been burned, had the same effect as a reinscription of said mortgage. *Hunt v. Innis*, 103
2. A notarial act executed by the parties holding the legal title to a piece of real estate which recited the execution and recording of a mortgage thereon, and the destruction of the mortgage record by fire, recited the reestablishment thereof according to law, admitted a specified sum to be due on said mortgage, and which sum the parties by the notarial act agreed to pay in installments, is itself a mortgage, and its inscription is effectual under the law of Louisiana to preserve its lien for ten years. *Id.*

INSOLVENCY.

1. The word "insolvency," as used in the 52d section of the currency act (13 Stat., 115; Rev. Stat., sec. 5242) is synonymous with the same word as used in the bankrupt act. *Cass, Receiver, v. The Citizens' Bank*, 23

2. To make transfers, assignments, deposits and payments void under said section, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made. *Ib.*

INSPECTION LAWS.

1. The right to make inspection laws is not granted to congress, but is reserved to the states; nevertheless, it is subject to the paramount right of congress to regulate commerce with foreign nations and among the several states. *Neilson v. Garza*, 287
2. If any state, as a means of executing its inspection laws, imposes any duty or impost on imports or exports, such duty or impost is void if it exceeds what is absolutely necessary for executing such inspection laws, but: *Ib.*
3. As the article of the constitution of the United States which prescribes the limit within which inspection charges shall be kept, goes on to provide that "all such laws shall be subject to the revision and control of congress," congress is the proper authority to decide whether a charge or duty is or is not excessive. *Ib.*
4. Therefore if a law passed by a state is really an inspection law, it must stand until congress sees fit to alter it, even though the fee allowed by it is in effect an impost or duty on imports or exports. *Ib.*
5. The scope of inspection laws is very large and is not confined to articles of domestic produce or manufacture, but applies also to articles imported and to those intended for domestic use. *Ib.*
6. The act of the legislature of Texas, approved October 14, 1871, and the further act, approved March 23, 1874, entitled "for the encouragement of stock-raising and the protection of stock-raisers," are inspection laws and are constitutional. *Ib.*

INSURANCE.

See LIFE INSURANCE.

1. Mere carelessness, negligence or unskillfulness of the master and officers of a boat do not relieve the insurance companies from liability to pay a loss occasioned thereby, unless it is so expressly stipulated. *Levi v. The New Orleans Insurance Association*, 63
2. It is otherwise when the master and officers of the boat are guilty of positive misconduct. *Ib.*
3. A clause in a river policy of insurance, in which it was warranted and agreed by the insured that the boat should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat at or before the time of any accident or disaster," relieved the insurance company from liability to pay a loss resulting from a collision occasioned by the negligence of the pilot. *Ib.*
4. Three insurance companies insured a steamboat for \$4,500 each, valued in each of the policies at \$27,000. The boat was sunk by a collision. *Held*, that if she were a total loss, or if she were abandoned to the insurers, they were bound to pay the full sum insured. *Ib.*
5. When the underwriters have paid the loss, a suit may be maintained in the name of the insured for their benefit, against the vessel through whose fault the loss occurred. *The Planter*, 490

INTEREST.

1. A bottomry bond contained no stipulation for ordinary interest, nevertheless it was *held*, that interest was recoverable at least from the date of the judicial demand. *The Grapeshot*, 42
2. Interest is not allowed in admiralty unless specially directed, but this rule so far as it governs the construction of the decrees of the supreme court only applies to cases where the decree of the court below in favor of libellant is affirmed. When such decree is reversed and the cause remanded, the circuit court may allow interest unless expressly forbidden to do so by the decree of the supreme court. *Ib.*
3. The fact that the ship against which the bottomry bond was asserted had been seized and sold on the libel, and the proceeds had remained for a long time in the registry of the court without producing interest, was no reason for refusing to allow interest on the sum found to be due. *Ib.*
4. Interest from the commencement of the suit is recoverable as a matter of law in an action upon a money demand, even though interest is not claimed in the petition. *Whitaker v. Pope*, 463
5. A claim for money taken as usury, while a law forbidding usury was in force, is not destroyed by the repeal of the law. *Ib.*

INTERVENTION AND THIRD OPPOSITION.

When the personal property of a public corporation is levied on at the suit of an individual, it is not necessary to file a bill in equity to restrain the sale. In Louisiana the sale may be restrained by intervention and third opposition. *Featherman v. Louisiana State Seminary*, 71

JUDGMENT.

See BANKRUPTCY, 5.

1. Generally, under the jurisprudence of Louisiana, a judgment rendered against a party whose domicile is not in the parish where the court is held is void. *Goodrich v. Hunton*, 137
2. A judgment is the decision or sentence of the law, pronounced by a court and entered upon its records. *Plant v. Gunn*, 372
3. The record of a judgment is notice only of what it contains. *Ib.*
4. Where the only evidence of a verdict and judgment was the indorsement thereof by the plaintiffs' attorney upon the declaration and the words "Nov. T. 1866, verdict," on the bench-docket: *Held*, that this was not such a judgment as constituted a lien upon the defendants' property, and a subsequent order of the court entering judgment *nunc pro tunc* would not give the judgment a lien upon the property of defendant, superior to a mortgage executed by him prior to the *nunc pro tunc* order. *Ib.*

JUDICIAL NOTICE.

1. The court should take judicial notice of the laws of a state whose territory once included the lands in controversy in the suit, on the ground that the laws of the former sovereignty of a country, which still affect its landed estates, are to be regarded as domestic and not foreign laws. *The City of Brownsville v. Cavazos*, 293

2. Authority given by a public act of the general assembly to a county to subscribe stock to a railroad company and issue bonds to pay for the same, need not be pleaded. The courts of the United States will take judicial notice of the public acts of the states within which they sit. *Smith v. Tallapoosa County*, 574

JURISDICTION.

See PARTNERS, 1, 2. PRACTICE IN EQUITY, 1, 2, 3, 23, 24. REMOVAL OF CAUSES, 7.

1. Receivers of National Banking Associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from state courts to the United States courts. *Bird's Executors v. Cockrem, Receiver*, 33
2. The existence of martial law does not prevent the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees will be binding on the parties. *Kimball v. Taylor*, 37
3. An act of the legislature of a state authorized the issue of fifteen millions of dollars in new consolidated bonds, to be exchanged for old bonds of the state, at the rate of sixty cents of consolidated bonds for one dollar of the old bonds, and declared that the consolidated bonds should be used for no other purpose than to take up the old bonds on the terms aforesaid, and levied an annual tax for the payment of the principal and interest of the consolidated bonds, and declared that every provision of the act should be considered a contract between the state and the holders of consolidated bonds, and the terms of the act were accepted by many holders of old bonds, and the exchange of bonds made: *Held*, that a subsequent act of the legislature which authorized the payment of consolidated bonds to general creditors of the state, dollar for dollar, was a violation of said legislative contract with the holders of the consolidated bonds, and was null and void, and that the United States courts would entertain jurisdiction of a suit to restrain the state officers from violating, under color of said unconstitutional and void act, the contract of the state with the holders of said consolidated bonds. *Id.*
4. The bankrupt court, in a proceeding by two partners in a firm of three, to have the partnership adjudicated bankrupt, has jurisdiction over the partnership property, although the third partner, in a proceeding in a state court to settle the partnership and to obtain a decree for the amount due him from his copartners, has had himself appointed receiver and is in possession of the partnership assets. *In re Hathorn & Batchelor*, 73
5. In such a case, the bankrupt court may enjoin such third partner from disposing of the assets of the partnership, or from any interference with them until the question, whether or not the firm is bankrupt, can be tried. *Id.*
6. A court of admiralty has not jurisdiction to try the question of title to certain logs which have been incorporated into a raft and floated down a public navigable river. *Gastrel & Raymond v. A Cypress Raft*, 213
7. Where, on a libel *in rem* to recover for repairs to a steamer, the jurisdiction of the district court was submitted to and the cause tried on its merits; after appeal to the circuit court, the claimants could not for the first time set up that the repairs were made in the home port of the steamer, and therefore did not create a maritime lien, no such fact being averred in the pleadings or shown by the evidence. *Meagher v. The Steamboat Lizzie*, 243
8. Perjury committed in the course of a judicial investigation, conducted under authority of acts of congress, is an offense against the public justice of the United States, and is exclusively cognizable in the courts of the United States. *Ex parte Dock Bridges*, 423

9. Section 6 of the "Act to further the administration of justice" (17 Stat., 197; Rev. Stat., sec. 915) does not confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment. *Chittenden & Co. v. Darden & Holston*, 437
10. The voluntary appearance of the defendant in a suit so commenced would cure the defect of jurisdiction, but service of summons made upon him *in invitum* while in the district would not. *Ib.*
11. The giving of a bond by a nonresident defendant for the release of property seized by process of foreign attachment, issued from a United States court, is not a voluntary appearance, and does not give the court jurisdiction. *Ib.*
12. Commissioners of the circuit courts of the United States have not, by statute, any power to issue writs of attachment returnable to said courts. *Ib.*
13. The removal of an assignee in bankruptcy by the district court, for a "cause which in its judgment renders such removal necessary or expedient," is not such a case or question as can be reviewed by the circuit court. *In re Adler & Brothers*, 571

JURORS.

1. The presence of one disqualified person upon the panel of a grand jury vitiates the indictments found by it. *The United States v. Hammond*, 197
2. Where a party indicted was neither in custody nor under bond when the grand jury which indicted him was impaneled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement. *Ib.*
3. A plea in abatement alleging such disqualification will not be favored, but should contain all essential averments pleaded with exactness. *Ib.*
4. A plea in abatement which alleged as a disqualification of a grand juror that he "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort," but without any specific averment of time or place, is uncertain and bad. *Ib.*
5. A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified. *Ib.*

LACHES.

Delay on the part of the government in enforcing its rights cannot be set up as a defense. *The United States v. Gausson, Executor*, 92

LAWS OF WAR.

See MARTIAL LAW.

1. A bill of exchange, drawn by a bank in Mobile while that city was in possession of the confederate forces, on a bank in New Orleans, after that city had surrendered to and was occupied by the federal forces, is void. *Williams, Adm'r, v. The Mobile Savings Bank*, 501
2. Such a bill is void, even though the payee of the bill, at the time he received it, supposed the city of New Orleans was still occupied by the confederate forces. *Ib.*
3. But where the payee of a bill of exchange paid therefor to the drawer the face value thereof, without knowledge of the fact that the territory where the

drawee resided had fallen into possession of a government at war with the government of the drawer, and it turned out that by reason of that fact the bill was void: *Held*, that the payee was in no fault, and could recover from the drawer, on the common counts, the money paid for the bill. *Ib.*

4. A steamboat, while under impressment by the Confederate States, was sunk, and was afterwards paid for in full by the confederate government. *Held*, that the wreck thereby became the property of the confederate government, and in the surrender of the confederate forces to the federal forces, became the property of the United States. *Leathers v. The Salvor Wrecking Co.*, 680

LEX LOCI CONTRACTUS.

1. As a general rule a contract is to be governed as to its interpretation, nature, obligation, performance or dissolution, by the law of the place where it was made. *Morgan v. The New Orleans, Mobile & Texas R. R. Co.*, 244
2. The principal exception to this rule is where the contract is made in one state or sovereignty, to be performed in another; in that case it is to be governed by the law of the place of performance. *Ib.*
3. But where a contract is made in one state, to be partly performed there, and partly performed in several other states, the contract is to be governed by the law of the place where it is made. *Ib.*

LEX REI SITÆ.

Where, in the performance of the contract, conveyances and transfers are to be made of property situate in several states, consisting of realty or other property subject to the local law, the conveyances and transfers should be made in accordance with the *lex rei sitæ*: *Morgan v. The New Orleans, Mobile & Texas R. R. Co.*, 244

LIEN.

See BANKRUPTCY, 11. MORTGAGE, 3, 4, 5. STEVEDORE.

LIFE INSURANCE.

1. The policy issued by a life insurance company provided that promissory notes payable during the year might be given by the assured for portions of the annual premium, and declared that, in case such notes were not paid at maturity, the policy should then and thereafter be void, without notice to any party or parties interested therein, and the notes also contained the same stipulation. *Held*, that the payment at maturity of the notes given for the premium was a condition precedent to the continuance of the policy, and on a failure to pay the notes the policy became void. *Thompson v. The Knickerbocker Life Ins. Co.*, 547
2. Where it was the custom of a life insurance company to give notice to the assured that the premium or premium note was about falling due, a neglect on the part of the company to give such notice will not save the policy from forfeiture, if the assured fails to pay the premium or premium note when due, unless the failure to give notice was fraudulent, and for the purpose of throwing the assured off his guard. *Ib.*
3. Where a policy of life insurance, and a premium note, contained the stipulations set out in the first head-note, and the premium note was not paid at maturity: *Held*, that the insurance company was not bound to elect whether or not the policy should be forfeited, or to give any notice of such election. *Ib.*

4. Where it was the custom of a life insurance company not to exact punctual payment of its premium notes, but to allow thirty days' grace thereon, the company is not bound to pay the insurance money if the assured dies within the thirty days without having paid the premium note. *Ib.*
5. A life insurance company is under no obligation to give notice to the assured when the annual premium is about falling due, of that fact, unless it has agreed to do so, even though it had been the practice of the company to give such notice. *Morey v. The New York Life Ins. Co.*, 663
6. The promise of the local agent of a life insurance company, that he would give the assured such notice, was only a personal contract of the agent, and not binding on the company, unless the agent was authorized by the company to make such promise. *Ib.*
7. Where the assured has been in the habit of paying the annual premium to the local agent of the company, and such payments have been accepted by the company without objection, although the policy provided for payment at the principal office of the company, a tender to such agent of the annual premium, on the day it falls due, is sufficient to prevent a forfeiture of the policy for nonpayment of the premium. *Ib.*
8. The failure of the insurance company to place the receipt for the premium in the hands of the local agent does not excuse payment or tender of payment on the day the premium falls due. *Ib.*

LIMITATIONS.

1. The code of Louisiana required that before property could be seized and sold on an order of seizure and sale, the judgment debtor should be served with notice thereof. The defendant was expelled by the United States military authorities, from the city of New Orleans, and carried within the Confederate lines. During his enforced absence, his property in New Orleans was seized and sold by the sheriff, notice of the seizure and sale being served upon a *curator ad hoc* appointed by the court. *Held*, that the sale was void, and was not protected by the prescription of five years provided for in section 2809 of the Revised Code of Louisiana. *Kimball v. Taylor*, 37
2. A suit brought by the assignees in bankruptcy of a bank, to recover money paid as counsel fees by persons acting without authority, as commissioners for the liquidation of the bank under the state law, is barred unless brought within two years from the time the cause of action therefor accrued in favor of the assignees. *Millenberger et al., Assignees, v. Phillips*, 115
3. When suit is brought against two debtors bound *in solido*, and service of citation made on one only, prescription in favor of the other is suspended during the pendency of the action against the one who is served, and is not merely interrupted by the service. *Ellery Wendt & Co. v. A. Brown & Co.*, 156
4. Section 5440 of the Rev. Stat. of the United States, which makes it a misdemeanor to "conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose," etc., forms a part of the revenue laws of the United States, and the limitation for prosecutions under said section is declared by section 1046, Rev. Stat., and is five years. *The United States v. Fehrenback*, 175
5. By a law of Texas, a judgment against the plaintiff in an action of trespass to try title is conclusive, unless he commences a second action within a year: *Held*, that the institution of a suit within the year by the original defendant, against the grantees of the original plaintiff for the same property, relieved the latter from the necessity of commencing suit within the year. They could defend their title in this second suit, and the claim of *res judicata* by the plaintiff in the second suit would not hold. *The City of Brownsville v. Cavazos*, 293
6. Where, in an action of trespass to try title, the grantees of the plaintiff, who

had lost his suit, neglect to bring a second action within a year, but the defendant in the first action sues the grantees of the plaintiff in that action for the same property, within a year after the determination of the first suit, and said grantees file a plea in the second action in the nature of a reconvention, claiming title to the property in dispute, and demanding damages for trespass thereto committed by the plaintiff: *Held*, that the plea was equivalent to a new action, and the said grantees were not concluded by the judgment in the first action. *Ib.*

7. Where there was a mixed possession of the property in controversy, and had been a continual contest of the parties over it, and absence of actual possession by either party of a great portion of the property, and a litigation of long standing respecting the title to it: *Held*, that no plea of prescription by either party would hold good. *Ib.*

LOUISIANA.

See CITATION. CONSTITUTIONAL LAW, 1, 2, 5. JUDGMENT, 1. LIMITATIONS, 1. MORTGAGE, 1, 2, 5. MUNICIPAL CORPORATIONS, 4, 5, 12, 13. PARTNERS, 1, 2. PLEDGE, 1. POSSESSOR. STATUTES CONSTRUED, 9. SURVIVORSHIP, 2, 3.

MALICE.

See MALICIOUS PROSECUTION, 1, 2, 3, 5.

MALICIOUS PROSECUTION.

1. A private corporation is liable in an action for malicious prosecution. *Copley v. The Grover & Baker Sewing Machine Co.*, 494
2. An action for the malicious prosecution of a proceeding, to have plaintiff declared a bankrupt, is based on the supposed malice of the defendant, and want of probable cause for the prosecution of the bankruptcy proceeding. *Sonneborn v. A. T. Stewart & Co.*, 599
3. A want of probable cause is evidence of malice sufficient to sustain the action, and will entitle the plaintiff to recover the actual damage sustained by him. *Ib.*
4. In order to justify a party in instituting proceedings in bankruptcy, he must be a creditor of the alleged bankrupt. He cannot justify himself by saying he had probable cause to believe himself a creditor, and also probable cause to believe his debtor had committed an act of bankruptcy. *Ib.*
5. Where it had been adjudicated by the highest court of law in the state, that the petitioner had no claim against the party whom he sought to put in bankruptcy, and the bankrupt court had refused to make a decree adjudicating the alleged debtor a bankrupt, in an action for malicious prosecution, the latter was, beyond question, entitled to recover the damages he had sustained by the unlawful attempt to put him in bankruptcy. *Ib.*
6. In such a case the measure of damages stated. *Ib.*
7. If the defendants had reason to believe that the plaintiff was indebted to them, and had probable cause to believe that he had committed an act of bankruptcy, they cannot be charged with actual malice, and cannot be made to pay exemplary damage. *Ib.*
8. Where a decision of the supreme court of the United States declared a certain act to be an act of bankruptcy, a party reposing on such decision is protected from the charge of actual malice in a proceeding to put his debtor in bankruptcy, based on the ground that he had committed such act, even though such decision were afterwards modified, provided the creditor had probable cause to believe his debtor had committed the act charged. *Ib.*

MANDAMUS.

1. The purpose of the writ of *mandamus* is to enforce, not to create legal duties.
The United States ex rel. v. The City of New Orleans, 230
2. It will not issue to compel officers of municipal corporations to levy and collect a tax unless the legislature has, either expressly or by implication, made it the duty of such officers to levy and collect such tax. *Ib.*
3. A general statute of Louisiana prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same, full provision was made for the payment of principal and interest; at the same time a special statute prescribed the form of the ordinance by which a particular debt might be created, and declared that such ordinance must be submitted to the legal voters of the corporation, and the assent of a majority of such voters was made a condition of its validity. *Held*, that where such ordinance, so submitted to the voters for their approval, contained no provision for the levying of any tax to pay the principal of the debt, but did contain another provision, which was evidently deemed ample for such purpose, it was the evident intention of the legislature that the principal debt should not be paid by taxation, and in such case the writ of *mandamus* to compel the levy of a tax to pay such principal was refused. *Ib.*
4. The acts of the legislature and the ordinance mentioned in the preceding headnote being in force, and the statute having declared that certain stock therein named should be perpetually pledged for the payment of the principal of the debt which the municipal corporation was, by the same statute, authorized to contract, the predecessors of respondents made a sale of said stock for the sum of \$350,000, which sum had long since been spent for other purposes, and no part of which was, or ever had been, in the possession or under the control of respondents. *Held*, that relators were not entitled to the writ of *mandamus* to compel the application of the said sum of \$350,000 to the payment of the principal of their debt. *Ib.*
5. Upon an application for the peremptory writ of *mandamus* to compel a court of county commissioners to assess and collect a tax to pay off a judgment recovered in a federal court against them, no matter can be set up against the application which was properly used as a defense against the recovery of the judgment. *Clews & Co. v. Lee County*, 474
6. Nor will it be a reason why the writ should not be granted, that the court of county commissioners has been enjoined from the assessment and collection of the tax by a state court. The effect of the case of *The Supervisors of Carroll County v. The United States*, 18 Wall., 71, considered. *Ib.*
7. Plaintiffs who had recovered a judgment against the county of Tallapoosa on coupons detached from bonds, which the board of county commissioners were authorized to issue, and to pay which the law made it their duty to levy and collect a tax, are entitled to the writ of *mandamus* to compel said commissioners to levy and collect the tax notwithstanding the fact that in a proceeding in equity (to which said plaintiffs were not parties), the chancery court had, before the recovery of said judgment, issued an injunction restraining the county commissioners from the levy and collection of any tax to pay said indebtedness, and said injunction still remained in force. *Smith & Co. v. Commissioners of Tallapoosa County*, 596
8. A court of county commissioners being vested by law with certain judicial functions, and also the ministerial function of levying and collecting taxes, the writ of *mandamus* to compel the levy of a tax by such body cannot be regarded as derogating from the judicial dignity with which they are *ex officio* invested. *Ib.*

MARRIED WOMEN.

1. A married woman cannot convey or encumber her real estate except in the manner prescribed by law. *Reid v. Rochersau & Co.*, 151
2. In Louisiana, she is not bound by a false declaration made in a mortgage executed by her, to the effect that the mortgaged property was community property, even if the mortgage is executed with all the forms prescribed by law. *Ib.*
3. Where a married woman in Louisiana had a separate paraphernal fund amounting to \$6,429, and invested it in property which cost \$10,970, the excess being paid out of the community funds, and took the deed in her own name: *Held*, that the property belonged to the community, and the married woman became the creditor of the community for the amount so invested by her. *Ib.*
4. A married woman voted for and signed the resolution for a composition without producing the authority of her husband therefor; but the husband afterwards made and filed an affidavit that he had given her his authority, and that her vote had his approval. *Held*, that such affidavit was both a ratification and estoppel, and made good the wife's act. *In re Bailey & Pond*, 222
5. Under the "married woman's law" of Alabama, as now construed, a married woman can in no case mortgage her separate estate, however acquired or held, for her husband's debts. *Mitchell v. Lippincott & Co.*, 467
6. If a husband borrow or use his wife's money or estate for his individual purposes, he becomes equitably indebted to her, and may secure her by payment, pledge, or in any other proper way. *Friedlander & Gerson v. Johnson and wife*, 675
7. A statute of Mississippi declares that "if the husband shall purchase property in his own name with the money of his wife, he shall hold the same only as trustee for her use; but such trust shall be void as against creditors of the husband, who contracted or gave credit in consequence of his possession of such property, without notice of the trust." *Held*,
 - (a) That this statute could not avail a creditor of the husband when the wife's property had once stood in the husband's name, but had been conveyed by him to a third person, who purchased in good faith and who had made a *bona fide* conveyance to the wife for a valuable consideration.
 - (b) That a creditor of the husband, in order to have the trust raised by the statute declared void in his favor, must show that credit was given by him to the husband in special and specific reliance on that particular trust property. *Ib.*

MARTIAL LAW.

The existence of martial law does not prevent the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees will be binding on the parties. *Kimball v. Taylor*, 37

MEASURE OF DAMAGES.

See DAMAGES.

MEXICO.

See ALIENS, 2, 4.

MISCONDUCT.

See NEGLIGENCE, 1, 2.

Misconduct is the transgression of some established and definite rule of action, where no discretion is left except what necessity may demand. *Levi v. The New Orleans Insurance Association*, 63

MISSISSIPPI.

See BANKRUPTCY, 43. MARRIED WOMEN, 7.

MORTGAGE.

See BONDS, 13, 14, 15. INSCRIPTION, 1, 2.

1. A mortgage on real estate to secure a debt executed by public act, according to the law of Louisiana, although it imports confession of judgment, may be enforced by suit in equity. *Benjamin v. Cavaroc*, 163
2. The fact that there is a statutory remedy in Louisiana on such a mortgage does not oust the jurisdiction of a court of equity to enforce it. *Ib.*
3. The modification of a mortgage does not extinguish it, nor is its lien affected by the substitution of a new note or bond for the original note or bond secured by it. *Ames, Trustee, v. The New Orleans, Mobile & Texas Railroad Co.*, 206
4. A railroad company having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage on the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the original mortgage had agreed to surrender the same, and receive in substitution therefor new bonds, to be secured by the original mortgage as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second. *Held*,
 - (a) That the holders of said twenty bonds were not entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the substituted bonds; but
 - (b) That they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, but were entitled to the same proportion of the proceeds of the mortgaged property as if the second mortgage had not been executed. *Ib.*
5. There is nothing in the jurisprudence of Louisiana contrary to the doctrine of this case. *Ib.*
6. A railroad company executed a first mortgage on its line of road to secure a large number of its bonds. The mortgage contained a clause declaring that whenever the company should procure from the state a loan of six thousand dollars per mile out of the school fund, to which it would be by law entitled on the performance of certain conditions, and which it was the declared intention of the company to obtain, and should execute to the state its bonds therefor, said bonds should constitute a lien upon the property mortgaged, superior to the lien of said first mortgage. Forty miles of the road remained to be completed, for which no loan from the state had been received. The legislature then passed an act authorizing the company to make a mortgage to secure bonds to the amount of six thousand dollars per mile upon this uncompleted portion of its road, which should be prior to the said first mortgage, provided the company would relinquish all claims to the state loan for that portion of its road. This mortgage was executed accordingly, and the bonds secured thereby, sold. *Held*, that by relinquishing the

right to the state loan, the company did not preclude itself, with the assent of the legislature, from putting the new mortgage upon the road, which should be superior to the original first mortgage. *Campbell v. The Texas & New Orleans Railroad Co.*, 263

7. A mortgage or trust deed, executed by a railroad company to secure its bonds, purported to convey a large number of sections of public lands, being a portion of what the company would be entitled to on the completion of its road; the certificates for which were receivable from time to time as portions of the road were completed: *Held*, that purchasers in good faith from the railroad company of a part of the certificates, without notice that they were covered by said deed of trust, acquired a good title free from the incumbrance of the trust deed. *Ib.*
8. A mortgage of chattels with possession and power of sale in the mortgagor is absolutely void. *Johnson's Assignee v. Patterson's Assignee*, 443
9. This rule has been changed in Georgia by a statute which provides that a mortgage "may cover a stock of goods or other things in bulk, but changing in specifics; in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches upon the purchases made to supply their place." The same statute declares that mortgages "must be recorded within three months from their date," but "mortgages not recorded within the time required remain valid as to the mortgagor, and are only postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage." Under these enactments, it was *held*, that when a mortgage was given on a stock of goods, and was not recorded for more than seven months, and the mortgagor remained in possession, and continued to sell off the stock and replenish it with new purchases, the mortgage was good as against general creditors of the mortgagor who had no notice of the mortgage, even though their claims were for goods sold to the mortgagor since the date of the mortgage, and before its registration, and the goods so sold formed a part of the mortgagor's stock. *Ib.*
10. A trust deed, executed by a railroad company to secure bondholders, construed. *Wilmer v. The Atlanta & Richmond Air-Line Railway Co.*, 447
11. Under the "married woman's law" of Alabama, as now construed, a married woman can in no case mortgage her separate estate, however acquired or held, for her husband's debts. *Mitchell v. Lippincott & Co.*, 467
12. A married woman executed a mortgage on her separate estate to secure her husband's debt at a time when, according to the decisions of the supreme court of the state, such a mortgage was valid. By subsequent decisions of the same court, such a mortgage was declared invalid: *Held*, in a proceeding to enforce the mortgage, that the federal court was bound by the later adjudications of the state supreme court. *Ib.*
13. A second mortgagee may, at any time, redeem the mortgaged premises by tendering the amount due on the first mortgage. If only interest was due, he may redeem by tendering the amount of such interest. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Co.*, 621
14. Where a first mortgage has been foreclosed, and a decree of sale made and execution issued accordingly, a second mortgagee, not made a party to the suit, cannot have an injunction to restrain the sale, as his rights are unaffected. *Ib.*
15. Such second mortgagee may, at any time, redeem the mortgaged premises by tendering the amount due on the first mortgage. If only interest were due, he might redeem by tendering the amount of such interest. *Ib.*

MUNICIPAL CORPORATIONS.

See Bonds, 7, 8, 9.

1. The taxes and public revenues of a municipal corporation cannot be seized on execution by its creditors, although the corporation is in debt and has no means of payment except the taxes which it is authorized to collect. *Peterkin v. The City of New Orleans*, 100
2. Neither the place nor manner in which the revenues of a municipal corporation are kept divests them of their public character or subjects them to be diverted, at the suit of creditors, from the purposes for which the law authorized them to be collected. *Ib.*
3. Such revenues are protected from seizure or attachment by creditors, although they may have been deposited in a bank for safe keeping, and the bank has thereby become the debtor of the corporation for the amount so deposited. *Ib.*
4. An act of the legislature required a municipal corporation to levy each year a special tax sufficient to pay the annual interest on certain of its designated bonds: *Held*, that the act authorized and required the levy of a tax to pay interest after the maturity of the bonds as well as before. *Ib.*
5. An act of the legislature, which provided for the issue of bonds by a municipal corporation, and prescribed the manner in which the tax to pay the interest thereon should be levied, and enacted safeguards to secure its levy and collection, on the faith of which legislation the bonds were sold, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact. *Maenhaut v. The City of New Orleans*, 108
6. Money collected to pay the interest on said bonds, levied, collected and set apart, according to the provisions of said act, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders. *Ib.*
7. A municipal corporation being required by law to levy an annual tax to pay interest on certain designated bonds, and having levied and collected the tax for that purpose, has no right to divert the fund to other purposes, and, upon application by the holders of the bonds, will be enjoined from so doing. *Ranger v. The City of New Orleans*, 123
8. Where a tax to pay interest on certain bonds had been levied by a municipal corporation for a series of years, and the interest due from year to year had been paid in full, although a portion of such interest tax for those years was in arrears, an injunction to restrain the corporation from receiving payment of said arrears in city scrip was refused, it being made to appear, that unless scrip were taken, the tax in arrears could not be collected at all. *Ib.*
9. The charter of a municipal corporation imposed conditions and restrictions upon its power to contract debts and issue bonds. Holders of bonds, issued in pursuance of the charter, made no opposition to the issue, at a subsequent date, of bonds contrary to the restrictions of the charter, and the latter bonds found their way into the hands of *bona fide* holders for value. *Held*: (a) That such irregularly issued bonds were binding on the municipal corporation. (b) That the holders of bonds regularly issued could not assail their validity. *Ib.*
10. Holders of the bonds, regularly issued, had no right to claim that their bonds should be paid in preference to the irregular bonds, out of moneys not specially collected for that purpose, even though the regular bonds were due and the irregular ones were not. *Ib.*
11. The writ of mandamus will not issue to compel officers of municipal corporations to levy and collect a tax unless the legislature has, either expressly or by implication, made it the duty of such officers to levy and collect such tax. *The United States ex rel. v. The City of New Orleans*, 230

12. The general statute of Louisiana prohibited municipal corporations from incurring any debt or liability unless in the ordinance creating the same, full provision was made for the payment of principal and interest; at the same time a special statute prescribed the form of the ordinance by which a particular debt might be created; and declared that such ordinance must be submitted to the legal voters of the corporation, and the assent of a majority of such voters was made a condition of its validity. *Held*, that where such ordinance, so submitted to the voters for their approval, contained no provision for the levying of any tax to pay the principal of the debt, but did contain another provision, which was evidently deemed ample for such purpose, it was the evident intention of the legislature that the principal debt should not be paid by taxation, and in such case the writ of *mandamus* to compel the levy of a tax to pay such principal was refused. *Ib.*
13. The acts of the legislature and the ordinance mentioned in the preceding headnote being in force, and the statute having declared that certain stock therein named should be perpetually pledged for the payment of the principal of the debt which the municipal corporation was, by the same statute, authorized to contract, the predecessors of respondents made a sale of said stock for the sum of \$350,000, which sum had long since been spent for other purposes, and no part of which was, or ever had been, in the possession or under the control of respondents. *Held*, that relators were not entitled to the writ of *mandamus* to compel the application of the said sum of \$350,000 to the payment of the principal of their debt. *Ib.*
14. A municipal corporation has not inherent power to issue negotiable coupon bonds which shall circulate as commercial paper, and be unimpeachable in the hands of a *bona fide* holder. *Hitchcock & Co. v. The City of Galveston*, 272
15. A city was authorized by its charter to exact the cost of sidewalk improvements from the owners of abutting lots to be collected by assessments on the property; to raise money for general and special purposes by taxation; and to issue bonds for a single purpose which was not sidewalk improvements: *Held*, that these provisions of the charter excluded the power to issue negotiable coupon bonds to pay for sidewalk improvements. *Ib.*
16. The charter of Brownsville of 1853 did not confer upon that city any title or interest belonging to the state of Texas in and to the land which was owned by the town of Matamoros, on December 18, 1836. *Ib.*
17. The power to issue commercial securities, the consideration of which cannot be inquired into in the hands of a *bona fide* holder, is not inherent in municipal corporations, nor can it be implied from the ordinary police powers given to such corporations. *Chisholm v. The City of Montgomery*, 584
18. A municipal corporation is but a subordinate branch of the government; it represents the state sovereignty in a limited district for specified purposes, which are local government and police. *Ib.*
19. The power of taxation is given to municipal corporations as a means of carrying out these purposes, and a diversion of the revenues to other purposes is unlawful and *ultra vires*. *Ib.*
20. A municipal corporation possesses no powers except such as are given expressly or by necessary implication. *Ib.*
21. Such a corporation has no power, without express authority, to subscribe to the stock of a railroad or plankroad company. *Ib.*
22. A municipal corporation was authorized by a special act to borrow a specified sum of money, and issue its bonds therefor; the money was borrowed and bonds issued accordingly. *Held*, that the power was thereby exhausted and became extinct. *Ib.*
23. A municipal corporation, without authority of law, subscribed for stock in a plankroad company, and issued its negotiable securities in payment thereof. *Held*, that it was not estopped by the resolutions of the city council, the

- acts of its officers, or by the negotiable form or other matter appearing upon the face of the bonds, from denying the authority of its officers to pledge the faith of the city in aid of the said road, or to issue the said bonds. *Ib.*
24. The fact that plaintiffs are *bona fide* holders of bonds issued by a municipal corporation is not a good reply to a plea setting up the want of power in the corporation to issue them. *Ib.*
25. Where an act of the legislature authorized the mayor and aldermen of a city, "with the consent of a majority of the corporation comprising said city," to subscribe money to any railroad leading from the city, and to borrow money to pay the same: *Held*, that there was thus conferred upon the municipal officers power to issue bonds to pay the subscription. *Milner's Administrator v. The City of Pensacola.* 632
26. Under authority of such a law, the mayor and aldermen of the city of Pensacola subscribed a large sum to aid the construction of a railroad from the city of Pensacola, and, in payment thereof, issued negotiable bonds payable to bearer in twenty years, which, on their face, stated that they were issued in conformity with law. In a suit brought by an innocent holder for value on the coupons belonging to said bonds, it was *held* to be no defense to the action; that at the election to obtain the "consent of the majority of the corporation comprising said city" to such subscription, only a minority of the citizens voted; nor that the question submitted to the citizens was whether the subscription should be made to construct a railroad from Pensacola to Montgomery, and the subscription was actually made to construct a railroad from Pensacola to the state line. *Ib.*
27. It is not within the power of a legislature, by a repeal of the charter of a municipal corporation, to invade the rights of its creditors and cancel its indebtedness. Such legislation impairs the obligation of contracts and is unconstitutional. *Ib.*

NATIONAL BANKS.

See RECEIVERS, 1.

1. The word "insolvency" as used in the 52 section of the currency act (13 Stat., 115, Rev. Stat., sec. 5242) is synonymous with the same word as used in the bankrupt act. *Case, Receiver, v. The Citizens' Bank,* 23
2. To make transfers, assignments, deposits and payments void under said section, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made. *Ib.*
3. The preference of one creditor to another by a national bank, mentioned in sec. 5242, Rev. Stat., is a preference given to the creditor to secure or pay a preexisting debt. *Casey, Receiver, v. La Soci   de Cr  dit Mobilier,* 77
4. When a national bank, being embarrassed and in need of assistance, receives a loan of money or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, this is not giving him a preference over other creditors, within the meaning of sec. 5242, Rev. Stat. *Ib.*
5. The receiver of an insolvent national bank holds only the estate and title of the bank in its assets, and he has no greater rights in enforcing their collection than the bank itself would have had. *Ib.*
6. Neither the bank nor its receiver could recover possession of negotiable securities pledged by the bank for advances to it, on the ground that the pledge was ineffectual for want of indorsement of the securities, while at the same time holding on to the assets to secure repayment of which the pledge was given. *Ib.*

7. A national bank which makes a contract not authorized by its charter cannot repudiate the contract, and at the same time retain its fruits. *Ib.*
8. When a national bank pledged a portion of its assets to secure a loan to itself, and the notes pledged were changed from time to time as they fell due, and others substituted in their stead, and this was according to the contract between the bank and the pledgee: *Held*, that the pledge of such substituted notes was not void. *Ib.*
9. When a national bank agreed to deposit with a certain commercial firm in pledge a portion of its assets to secure a loan to be made to itself, and the loan was received by the bank, it was *held*, that there was no legal obstacle to the depositing of the assets according to the contract, arising from the fact that the president of the bank was a member of firm with which the deposit was to be made. *Ib.*

NEGLIGENCE.

See INSURANCE, 3.

1. Negligence, carelessness and unskillfulness are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. *Levi v. New Orleans Insurance Association*, 63
2. Section 3651 of the revised statutes of Louisiana of 1870 was intended to apply only in cases where the carelessness of the officers of a boat is so gross as to justify a criminal prosecution; in other words, to cases of misconduct. *Ib.*

NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE. BONDS, 6.

Where a coupon is payable at a particular place, presentation for payment at that place is not a condition precedent to a recovery of judgment thereon by suit. *Smith v. Tallapoosa County*, 574

NOTICE.

See INDORSER, 2. JUDICIAL NOTICE. LIFE INSURANCE, 1, 2, 3.

1. An act of the legislature authorized the governor to indorse in behalf of the state the first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his indorsement as the authority therefor: *Held*, (a) That the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold. (b) That *bona fide* holders for value of the bonds indorsed by the governor assuming to act under said authority, were not charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds. *Young v. The Montgomery & Eufaula Railroad Company*, 606
2. An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that this law did not pass the legislature by the vote required by the constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds: *Held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything. *Ib.*

3. A life insurance company is under no obligation to give notice to the assured when the annual premium is about falling due, of that fact, unless it has agreed to do so, even though it had been the practice of the company to give such notice. *Morey v. New York Life Insurance Company*, 663
4. The promise of the local agent of a life insurance company, that he would give the assured such notice, was only a personal contract of the agent, and not binding on the company, unless the agent was authorized by the company to make such promise. *Ib.* 16.

NOVATION.

- A consent decree made in a case brought to enjoin the enforcement of a mortgage, by which the mortgage was recognized, the rate of interest increased, and the time for the payment of the debt secured thereby extended, and which declared that "this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same," did not have the effect of extinguishing the mortgage, nor was the mortgage merged in the decree. *Hunt v. Innes*, 103

OFFICIAL BONDS.

1. Where the condition of the bond of a collector of customs was, that he should faithfully discharge the duties of his office according to law, the law referred to was any law that was on the statute book at the date of the bond, or that might be passed during the collector's term, prescribing the powers and duties of his office. *The United States v. Gausson, Executor*, 92
2. Where the duties and responsibilities of a collector of customs were changed by law subsequent to the execution of his official bond, but the nature and general duties of his office remained the same, the sureties on the bond remained liable. *Ib.*
3. Where duties not required by law to be performed by him were imposed on a collector by the superior officers of the treasury department, he was still required to discharge his duties according to law, and the sureties on his official bond were liable for his failure to do so. *Ib.*

OFFICERS.

See PUBLIC OFFICERS.

PARTIES.

See JURISDICTION, 1. PRACTICE IN EQUITY, 36, 37, 38, 43.

1. In a suit in equity for a demand due to a partnership, all the partners must be joined either as complainants or defendants. They are not merely proper but necessary parties. *Parsons v. Howard*, 1
2. The United States courts have no power to effect a constructive service of process on nonresidents. If nonresidents are necessary parties, unless they voluntarily appear, the suit cannot be maintained in the federal courts. If they do appear as defendants and are citizens of the same state with the complainants, the court is ousted of jurisdiction. *Ib.*
3. *Semble*, that a suit against partners may be brought in a federal court although some of them may not be found within the jurisdiction of the court. *Ib.*
4. Where a state is concerned in the subject matter of the suit, it should be made a party, if that can be done; but the fact that the state cannot be

sued is a sufficient excuse for not making it a party. *Young v. The Montgomery & Eufaula Railroad Company*, 606

5. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party in a suit brought by holders of bonds secured by the mortgage to foreclose the same. *Ib.*
6. A complainant cannot be compelled to add new parties to his bill, if he chooses to take the responsibility of their not being made parties. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Company*, 621
7. Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings, or any other purpose. The remedy is by original bill. The exceptions noted. *Anderson v. The Jacksonville, Pensacola & Mobile Railroad Company*, 628
8. Persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as quasi parties, and may be heard on petition or motion. *Ib.*
9. Petition for a stay of proceedings on execution by persons not parties to the suit, and by other persons who consented to the decree, upon condition that proceedings upon it should be suspended upon certain terms — which were not complied with — dismissed. *Ib.*

PARTNERS.

See PRACTICE IN EQUITY, 1, 3.

1. Generally, after the dissolution of a partnership, the partners must be sued in the parish of their domicile. *Goodrich v. Hunton*, 137
2. But notwithstanding the dissolution of a partnership, it still continues for the purpose of liquidation and partition of its assets, and all the partners can be legally sued in the domicile of the firm for such purposes. *Ib.*
3. One of the individuals composing a firm was adjudicated a bankrupt. One of the other members of the firm offered as proof of a claim in his favor against the bankrupt, evidence to show that the firm of which the bankrupt had been a member was indebted in certain specified amounts which still remained unpaid, insisting that such evidence established an indebtedness from the bankrupt to him to the amount of one-third of said partnership debts. *Held*, that such proof was properly rejected as not tending to establish any claim against the bankrupt in favor of his copartner, unless accompanied by proof that the copartner setting up the claim had paid said partnership debts. *Hester v. Baldwin*, 433

PARTNERSHIP.

See BANKRUPTCY, 1, 2. PRACTICE IN EQUITY, 1, 3.

PATENTS.

1. It is no defense to an action for an infringement of a patent for a combination of several well known devices, for defendant to allege that he has improved upon one of the independent devices used in the combination. *Converse v. Cannon*, 7
2. Where a patent covers a combination of devices for handling steamboat staging, consisting of a rope attached to a derrick, and the application of force by means of a power windlass, the use of the combination without authority will be an infringement, notwithstanding variations in the method of attaching the rope, or in the form of the derrick, or in the position in which the stage is placed on the deck of the boat. *Ib.*

3. When the question of the applicability of an invention to revolving cotton presses, other than portable ones, had been raised in the original application and abandoned, and therefore had not been inadvertently or accidentally overlooked, a reissue of the patent by which the invention is made to apply to stationary as well as portable presses is improper and void. *Wicks v. Stevens*, 310
4. The alleged improvement to revolving cotton presses, patented to Rhodom M. Brooks in 1866, and extended in 1872, was known and used long before Brooks applied for his patent. The patent is therefore void. *Ib.*

PAYMENTS.

See STATUTES CONSTRUED, 1.

1. The drawing of a check and the delivery thereof to the payee, without presentation, acceptance or payment, does not transfer from the drawer to the holder of the check so much of the fund drawn on as is equal to the sum named in the check. *A. & B. Strain v. Gourdin, Assignee*, 380
2. A debtor can not, without the consent of his creditor, substitute another person in his stead as the debtor. *Ib.*

PHOTOGRAPHIC COPIES.

See EVIDENCE, 3.

PLEA IN ABATEMENT.

1. Where a party indicted was neither in custody nor under bond when the grand jury which indicated him was impaneled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them by plea in abatement. *The United States v. Hammond*, 197
2. A plea in abatement alleging such disqualification will not be favored, but should contain all essential averments pleaded with exactness. *Ib.*
3. A plea in abatement which alleged as a disqualification of a grand juror that he "did take up arms and join the insurrection or rebellion against the United States, and adhered to said insurrection or rebellion, giving it aid and comfort," but without any specific averment of time or place, is uncertain and bad. *Ib.*
4. The proper conclusion of a plea in abatement is a prayer that the indictment be quashed. *Ib.*
5. When a plea in abatement prays for a judgment which the court can not give upon a plea in abatement, the plea is defective and bad. *Ib.*
6. A plea in abatement alleging a disqualification of one of the grand jurors who found the indictment need not be verified. *Ib.*
7. When a defendant does not reside in the state where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement, he cannot set it up afterwards. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Co.*, 621

PLEADING.

See PARTIES, 1, 3, 4, 5, 6, 7, 8. PLEA IN ABATEMENT. PRACTICE IN EQUITY, 1, 8, 9, 10, 16, 17, 25, 31, 36, 37, 39, 47, 51, 52, 55. PRACTICE AT LAW, 3, 4, 5, 6, 7.

PLEDGE.

See RES JUDICATA, 1.

1. The legislature of Louisiana has left it in doubt whether indorsement as well as delivery is essential to the pledge of a negotiable instrument. *Casey, Receiver, v. La Societe de Credit Mobilier*, 77
2. Neither the bank nor its receiver could recover possession of negotiable securities pledged by the bank for advances to it, on the ground that the pledge was ineffectual for want of indorsement of the securities, while at the same time holding on to the assets to secure repayment of which the pledge was given. *Ib.*
3. When a national bank agreed to deposit with a certain commercial firm in pledge, a portion of its assets to secure a loan to be made to itself, and the loan was received by the bank, it was held that there was no legal obstacle to the depositing of the assets according to the contract, arising from the fact that the president of the bank was a member of the firm with which the deposit was to be made. *Ib.*
4. When a national bank pledged a portion of its assets to secure a loan to itself, and the notes pledged were changed from time to time as they fell due, and others substituted in their stead, and this was according to the contract between the bank and the pledgee: Held, that the pledge of such substituted notes was not void. *Ib.*

POLICY.

See LIFE INSURANCE, 1, 2, 3, 4.

POSSESSOR.

1. Under the jurisprudence of Louisiana, a possessor in bad faith is entitled to compensation for improvements and betterments put upon the land by him which have been accepted by the owner, together with interest on the amount expended therefor, and is chargeable with the rents and profits with interest. *Jackson v. Ludeling*, 254
2. By the law of Texas, if a person acquires and holds possession of land in good faith, believing it to be his own, or to belong to the person of whom he holds it, he is entitled to be paid for the permanent and valuable improvements made by him thereon, though his title proves to be invalid. *Campbell, Adm'r, v. Brown*, 349
3. But after the party having the better title brings suit to recover the property, the person in possession, or any one taking possession under the same title during the pendency of the suit, can no longer set up the plea of good faith, and cannot recover for improvements made after the commencement of the suit. *Ib.*

POWERS.

1. A power in a trust deed to sell and reinvest on the same limitations and trusts does not include by implication the power to mortgage. *The Patapoco Guano Company v. Morrison, Trustee*, 395
2. Nor does a statutory provision giving power to the judge of a court to pass an order authorizing the trustee to sell or convey the corpus of the trust estate confer power to authorize the trustee to mortgage it. *Ib.*

PRACTICE IN ADMIRALTY.

See ADMIRALTY, 1, 5, 6, 7.

1. When the supreme court reversed a decree in admiralty and remanded the cause to the circuit court, with instructions to render a decree against the ship for the amount found due for supplies and repairs actually furnished and really necessary, and the supplies and repairs were furnished upon a bottomry bond which entitled the libellants to a premium of 19½ per cent. for the voyage: *Held*, that such premium should be included in the amount to be decreed by the circuit court. *The Grapeshot*, 42
2. Interest is not allowed in admiralty unless specially directed, but this rule, so far as it governs the construction of the decrees of the supreme court, only applies to cases where the decree of the court below in favor of libellant is affirmed. When such decree is reversed and the cause remanded, the circuit court may allow interest, unless expressly forbidden to do so by the decree of the supreme court. *Ib.*
3. The 19th admiralty rule was intended to prohibit a joinder of proceedings *in rem* and *in personam*, in the same libel for the salvage of the same goods. *Nott v. The Steamboat Sabine and Cargo*, 211
4. A court of admiralty has no jurisdiction to try the question of title to certain logs which have been incorporated into a raft and floated down a public navigable river. *Gastrel & Raymond v. A Cypress Raft*, 213
5. When on a libel *in rem* to recover for repairs to a steamer, the jurisdiction of the district court was submitted to, and the cause tried on its merits; after appeal to the circuit court, the claimants could not for the first time set up that the repairs were made in the home port of the steamer, and therefore did not create a maritime lien, no such fact being averred in the pleadings or shown by the evidence. *Meagher v. The Steamboat Lizzie*, 243
6. Where a seizure is made on water and the proceeding is consequently in admiralty, and there is default, the court should use a wise discretion whether to require proofs or not. *The United States v. The Steamer Mollie*, 313
7. In all such cases, proclamation to appear should be made and a decree entered for default and contumacy, and upon reading the libel and proceedings thereon, and with or without proof as the court may direct, such decree should be made as the nature of the case may require. *Ib.*

PRACTICE IN EQUITY.

See EQUITY.

1. In a suit in equity for a demand due to a partnership, all the partners must be joined either as complainants or defendants. They are not merely proper but necessary parties. *Parsons v. Howard*, 1
2. The United States courts have no power to effect a constructive service of process on nonresidents. If nonresidents are necessary parties, unless they voluntarily appear, the suit cannot be maintained in the federal courts. If they do appear as defendants, and are citizens of the same state with the complainants, the court is ousted of jurisdiction. *Ib.*
3. *Semble*, that a suit against partners may be brought in a federal court, although some of them may not be found within the jurisdiction of the court. *Ib.*

4. The fact that holders of bonds issued by a state are prohibited, by the eleventh amendment to the constitution of the United States, from obtaining judgment on their bonds by suit against the state, in a court of the United States, does not authorize a court of equity, by decree, to compel the state officers to levy and collect a tax for the payment of principal and interest of the bonds. *McCauley v. Kellogg*, 13
5. A court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. *Ib.*
6. A court of the United States will not compel, by injunction, the officers of a state to execute the laws of the state. To do so would be an attempt by the court to administer the state government. *Ib.*
7. An action in a court of the United States against the executive officers of a state, in their official capacity, to compel them to comply with a contract of the state by the enforcement of its laws, is, to all intents and purposes, an action against the state, and prohibited by the eleventh amendment to the constitution of the United States. *Ib.*
8. When the personal property of a public corporation is levied on at the suit of an individual, it is not necessary to file a bill in equity to restrain the sale. In Louisiana the sale may be restrained by intervention and third opposition. *Featherman v The Louisiana State Seminary*, 71
9. An alternative prayer does not necessarily make a bill multifarious. *Kilgour v. The New Orleans Gas Light Co.*, 144
10. If process is prayed against all the necessary parties to a bill, a demurrer for want of proper parties will not lie on the ground that some have not been served with process. *Ib.*
11. It is an indispensable prerequisite to a creditor's bill which seeks to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, that the claim should first have been reduced to judgment. *Stewart v. Fagan*, 215
12. A court of chancery may refer a matter for inquiry as to the facts at any stage of the cause, even on final hearing. *In re Walshe*, 225
13. A bill of review can only be sustained upon the ground of error apparent on the record, and the record consists of the pleadings, proceedings and decree, and does not include the evidence. *Barker's Heirs v. Barker's Assignee*, 241
14. A party holding a first incumbrance on property about to be brought to sale, ought not to be deprived of the right of bidding on the property up to the amount of his claim. Therefore, when his right of priority is in dispute, it ought to be settled before the sale; and whenever a specific property, on which a separate incumbrance exists, can be sold separately without injury to or sacrifice of that or other property, it should be thus sold so as to give every incumbrancer the chance of protecting his securities without involving himself in onerous engagements. *Campbell v. The Texas & New Orleans R. R. Co.*, 263
15. After a decree *pro confesso*, taken in a cause in equity, it is often proper for the court to inform itself through its own officers, as by the report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case. *Forbes v. The Memphis, El Paso & Pacific R. R. Co.*, 323
16. Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in

the land grant mortgages of the company, in behalf of themselves as well as all other stockholders, creditors or bondholders who might desire, and be entitled to intervene, and the bill charged that the officers, agents and directors of the company were squandering and embezzling its property, and the purpose of the suit was that the assets of the company might be preserved and administered, and the relief prayed was proper to be granted, and a decree *pro confesso* had been regularly entered, a receiver properly appointed, an authentic report of the facts made to the court, and its judgment passed thereon; individual stockholders were not permitted to intervene in the suit as defendants, and file a cross bill on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to. *Ib.*

17. In such a suit, in which such proceedings had been taken, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. *Ib.*
18. In such a suit, rival creditors, by proceedings before the master, may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property. *Ib.*
19. In such a suit, persons will not be allowed to intervene as general defendants and contestants, unless they show that they have an interest in the results as stockholders or otherwise, and are also able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. *Ib.*
20. A state indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien on all the property of the company; and that upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property, and sell the same for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale: *Held*, that at the suit of a holder of bonds of a subsequent issue, which the state had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the state, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the state, nor appoint a receiver therefor. *Branch v. The Macon & Brunswick R. R. Co.*, 385
21. The relief asked in such a case could not be granted without adjudicating the rights of the state, which ought not to be done unless the state were a party, and the state could not be made a party. *Ib.*
22. A railroad company having its residence and principal office at Atlanta, Ga., conveyed to trustees, by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, N. C., and other property to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed to pay either the interest or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same (or such part as might be necessary) at Atlanta to pay the sum in default. *Held*:
(a) That on default made in the payment of interest, and a demand upon the trustees by the bondholders that they should take possession of the trust property, and a failure of the trustees to do so, the court, on a bill filed by

the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.

(b) Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts secured by the trust deed.

(c) When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.

(d) The circuit court of the United States for the northern district of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road and other property included in the deed of trust, whether within or without the state. *Wilmer v. The Atlanta & Richmond Air-Line Railway Co.*, 409

23. Where a bill was filed, the prayer of which was, that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of and administer the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver appointed by this court in the case thus commenced: *Held*, that by these proceedings the court acquired constructive possession of the trust property, and that possession thereof, taken under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. (Per Woods, Circuit Judge.) *Ib.*
24. *Contra*. Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and, until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of coördinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced or process *in personam* was served. (Per BRADLEY, Circuit Justice.) *Ib.*
25. Where certain bondholders whose bonds were secured by a deed of trust filed in behalf of themselves and all other bondholders whose bonds were secured by the same deed, who chose to come in as complainants and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered and the trust property sold and its proceeds distributed, and the other bondholders were numerous and some of them unknown: *Held*, that it was not a valid objection to the making of a decree in accordance with the prayer of the bill, that all the bondholders were not made actual parties; they might be allowed to come in as complainants, or might propound their claims before the master. *Wilmer v. The Atlanta & Richmond Air-Line Railway Co.*, 447
26. Where a railway is conveyed by a trust deed or mortgage to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold before the principal is due, on default in the payment of interest. *Ib.*
27. If two railroad corporations, created by different states, join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust in the district where one of the corporations resides, and it is served with process, and the other corporation, being a nonresident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court. *Ib.*

28. The Atlanta & Richmond Air Line Railway Company conveyed to trustees by a single deed all its line of road extending from Atlanta, Georgia, through South Carolina to Charlotte, North Carolina, to secure the payment of a series of bonds issued by the railway company, and the railroad was an indivisible and inseparable piece of property which could not be divided without injury to its value: *Held*, that the court had jurisdiction to decree that the trustees should sell the entire line of road, according to the terms of the trust, notwithstanding a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole property. *Ib.*
29. Penalty of bond for appeal fixed under rule 32 of the supreme court. *Ib.*
30. A married woman executed a mortgage on her separate estate to secure her husband's debt at a time when, according to the decisions of the supreme court of the state, such a mortgage was valid. By subsequent decisions of the same court, such a mortgage was declared invalid: *Held*, in a proceeding to enforce the mortgage, that the federal court was bound by the later adjudications of the state supreme court. *Mitchell v. Lippincott & Co.*, 467
31. Where there is a prayer for general relief, a court of equity may afford such relief as the averments of the bill and the proofs warrant, although the complainant may not be entitled to the relief specifically prayed for. *Moore v. Mitchell*, 483
32. Exceptions to the report of a master should be precise, and raise well defined issues. When they are vague and general, and require of the court the performance of duties which properly belong to the master and counsel, they will be overruled. *Stanton et al., Trustees, v. The Alabama & Chattanooga Railroad Co.*, 506
33. A person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road is not entitled to payment out of the earnings of the road, or the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers. *Davenport v. The Receivers of the Alabama & Chattanooga Railroad Co.*, 519
34. When a court of equity was called on for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a nonresident naked trustee, and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible. *Ketchum v. The Mobile & Ohio Railroad Co.*, 532
35. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise. *Ib.*
36. Junior mortgagees may file a bill to foreclose their mortgage without making prior mortgagees parties, but a sale in such a case would necessarily be made subject to the prior mortgages. *Young v. The Montgomery & Eufaula Railroad Co.*, 608
37. In such a suit, the prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them. *Ib.*
38. If, however, such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them. *Ib.*
39. When junior mortgagees have first brought their suit to foreclose, and the

court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun, until the first is ended. *Ib.*

40. It is not necessary to aver matter of law or public statute, of which the court takes judicial notice. *Ib.*
41. Where a state is concerned in the subject matter of the suit, it should be made a party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party. *Ib.*
42. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party in a suit brought by holders of bonds secured by the mortgage to foreclose the same. *Ib.*
43. When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of coordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him. *Ib.*
44. A justice of the supreme court, prior to the "act to further the administration of justice," of June 1, 1872 (Rev. Stat., sec. 719), could grant an injunction at any place, in or out of the circuit in which the suit was instituted. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Co.,* 621
45. By the seventh section of that act, it is provided that no justice of the supreme court shall grant injunctions except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge. *Ib.*
46. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute as well as when they cannot hear it for any other cause; and the supreme court justice may hear the application at any place where he may be. *Ib.*
47. Where a first mortgage has been foreclosed, and a decree of sale made and execution issued accordingly, a second mortgagee, not made a party to the suit, cannot have an injunction to restrain the sale, as his rights are unaffected. *Ib.*
48. A complainant cannot be compelled to add new parties to his bill, if he chooses to take the responsibility of their not being made parties. *Ib.*
49. When a defendant does not reside in the state where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement, he cannot set it up afterwards. *Ib.*
50. The court will not appoint a receiver of property which is in the possession of a person not a party to the suit. *Ib.*
51. An injunction to prevent a sale under execution will not be granted to a person who was not a party to the decree, unless he can show that his rights will be directly affected by the sale. Thus, where property has been sold under a first mortgage by a statutory proceeding, and the purchasers fail to pay the price of sale, although they have obtained a deed for, and possession of the property, and a bill is filed on the vendor's lien to compel payment of the balance, and a decree is obtained to that effect, and execution issued, a second mortgagee cannot have an injunction to prevent the sale, his rights being extinguished by the statutory sale. *Ib.*
52. Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings, or any other purpose. The remedy is by original bill (the exceptions noted). *Anderson v. The Jacksonville, Pensacola & Mobile Railroad Co.,* 628

53. Persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition or motion. *Ib.*
54. Parties who have withdrawn their answer, and consented to a decree cannot afterwards ask to have proceedings on the decree suspended. *Ib.*
55. A consent decree was entered upon the basis of a certain agreement between the parties, by which execution was to be suspended upon certain terms. These terms not being complied with, the execution may be enforced. *Ib.*
56. Petition for a stay of proceedings or execution by persons not parties to the suit, and by other persons who consented to the decree, upon condition that proceedings upon it should be suspended upon certain terms — which were not complied with — dismissed. *Ib.*
57. Where the Trustees of the Internal Improvement Fund of Florida were restrained by the order of the court from selling or disposing of any lands belonging to their trust, except in strict accordance with the act of the legislature prescribing their duties, and the exercise of judgment and discretion was required on the part of the trustees as to the true construction of their powers and duties under the act, and they answered under oath that they had done no act which they believed or supposed was in violation of any direction of the court, but had in good faith tried to obey the decree of the court, a motion to attach them, as for a contempt for disobedience of the decree of the court, was overruled. *Voss v. The Trustees of The Internal Improvement Fund of Florida,* 647
58. Neither a petition, nor an order of the court, for a rehearing, of itself stops proceedings under the decree, unless the court so specifically directs. *Ib.*
59. Lands belonging to the public domain of a state which, by an act of the legislature, had been made a trust estate for the payment of certain bonds, and placed under the control of trustees appointed by law, were subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court could appoint its own agents to make sales thereof. *Ib.*
60. In such a case, the court has the power to compel the trustees who hold the legal title to execute conveyances for the lands sold by the agents of the court. *Ib.*

PRACTICE AT LAW.

1. A default was set aside and judgment opened where defendant, by affidavit, excused his neglect in not making defense, and made it appear that he had a good defense, and offered to pay costs and plead *instantly*; the motion to set aside the default having been made at the term at which the judgment was rendered, and continued several terms without fault of defendant. *Hand v. Yahoola Mining Co.,* 407
2. Interest from the commencement of the suit is recoverable as a matter of law in an action upon a money demand, even though interest is not claimed in the petition. *Whitaker v. Pope,* 463
3. *Indebitatus assumpsit* would be a proper form of action at common law, to recover money paid as usury. Under the code of Georgia, the action for open account would seem to be applicable. *Ib.*
4. A bill of particulars appended to a petition to recover money paid as usury, which sets forth the usurious payments or general indebtedness for cash paid by the plaintiff to the defendant, is sufficient. *Ib.*
5. Where an action was brought in the name of A. for the use of B., and it appeared on the trial that before suit brought, A. had assigned the claim to B., who therefore held the legal title, an amendment under the code of

- Georgia was allowed after verdict by striking out the name of A. from the petition. *Ib.*
6. Where a debtor had notice that his creditor A. had assigned the debt due him to B. and, afterwards procured a counterclaim against the original creditor A., *held*, that he could not use such claim as a setoff in a suit brought in the name of A. for the use of B., to recover the debt assigned to B. *Ib.*
7. Authority given by a public act of the general assembly to a county to subscribe stock to a railroad company and issue bonds to pay for the same, need not be pleaded. The courts of the United States will take judicial notice of the public acts of the states within which they sit. *Smith v. Tallapoosa County*, 574

PREMIUM NOTE.

See LIFE INSURANCE, 1, 2, 3, 4.

PRESCRIPTION.

See LIMITATIONS.

PRESENTATION FOR PAYMENT.

See NEGOTIABLE INSTRUMENTS.

PRESUMPTIONS.

See SURVIVORSHIP, 1, 2, 3, 4.

PRIVITY.

See EQUITY, 7.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION, 2, 3, 4, 7, 8.

PROCESS.

See CITATION. PRACTICE IN EQUITY, 1, 2, 3, 4. STATUTES CONSTRUED, 14.

1. Under the practice of the clerks of the state courts of Louisiana, the absence of a seal from a citation in the copy of a record is no proof that the original citation was without seal. *Kimball v. Taylor*, 37
2. Service of an irregular or erroneous summons or citation is not void, when the service is personal. *Ib.*
3. A foreign corporation may be "found" in the sense in which that word is used in the judiciary act in a state other than that by whose law it was created. *Knott v. The Southern Life Insurance Co.*, 479
4. A statute of Alabama declared that no foreign insurance company should do business in that state, unless it filed an agreement that service of process upon its agent in the state should be taken and held as service upon the company: *Held* that process from the United States courts for the districts of Alabama fell within the terms of the statute and agreement. *Ib.*

PUBLIC OFFICERS.

- A declaration which alleges that the unlawful means by which the plaintiff was prevented from voting was the erroneous decision of the defendant, who was an officer of the election, upon a question of law, without averring that the decision was willfully or maliciously wrong, is insufficient. *Seeley v. Koss*, 368

RECEIVERS.

See NATIONAL BANKS, 6.

1. Receivers of national banking associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from state courts to the United States courts. *Bird's Executors v. Cockrem, Receiver*, 32
2. The receiver of an insolvent national bank holds only the estate and title of the bank in its assets, and he has no greater rights in enforcing their collection than the bank itself would have had. *Casey, Receiver, v. La Soci  t   de Cr  dit Mobilier*, 77
3. A railroad company having its residence and principal office at Atlanta, Ga., conveyed to trustees, by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, North Carolina, and other property to secure the payment of the principal and interest of 4,248 bonds of 1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed to pay either the interest or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same or such part as might be necessary at Atlanta to pay the sum in default. *Held*:
 - (a) That on default made in the payment of interest, and a demand upon the trustees by the bondholders that they should take possession of the trust property, and a failure of the trustees to do so, the court, on a bill filed by the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.
 - (b) Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts secured by the trust deed.
 - (c) When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.
 - (d) The circuit court of the United States for the northern district of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road and other property included in the deed of trust, whether within or without the state. *Wilmer v. The Atlanta & Richmond Air Line Railroad Co.*, 409
4. Where a bill was filed, the prayer of which was, that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of and administer the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver appointed by this court in the case thus commenced: *Held*, that by these proceedings the court acquired constructive possession of the trust property, and that possession thereof, taken under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other

court first obtained actual possession of the property. (Per Woods, Circuit Judge.) *Ib.*

5. *Contra.* Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and, until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of co-ordinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced or process in *personam* was served. (Per BRADLEY, Circuit Justice.) *Ib.*
6. Where a decayed and dilapidated railroad and its appurtenances are in the possession of receivers by authority of a decree of court, made in a cause brought by trustees of a first mortgage to foreclose the same, and it is necessary to borrow money in order to preserve the road and complete some inconsiderable portions thereof, and to put it in condition for the transaction of its business, the court may authorize the receivers to borrow money for such purposes, and make the sums so borrowed a lien on the railroad property superior to that of the first mortgage. *Stanton et al., Trustees, v. The Alabama & Chattanooga Railroad Co.,* 506
7. The order of the court authorizing the receivers to borrow money prescribed that they should issue for the money borrowed, certificates payable in ten years, bearing eight per cent. interest, payable semi-annually, and that the same should not be sold or disposed of for less than ninety cents on the dollar. The receivers issued certificates payable to bearer, and which referred to the order of the court by authority of which they were issued. *Held,*
 - (a) That such certificates were not commercial paper, good in the hands of *bona fide* holders, no matter what vice or infirmity might attend their original issue.
 - (b) That they were good for the amount of money actually paid for or advanced on them to the receivers in accordance with the terms of the order of court. *Ib.*
8. Persons who bought said certificates, or advanced money on them to the receivers, were not bound to see that the money was applied to the purposes of the trust. *Ib.*
9. When such certificates were hypothecated by the receivers to secure moneys advanced to them, and their face value greatly exceeded the sums borrowed, the court ordered that the certificates not necessary at ninety cents on the dollar to secure the sums so advanced should be returned to the receivers. *Ib.*
10. Receivers who willfully and corruptly exceed their powers are liable for the actual damage sustained by reason of their misconduct, but for nothing more. *Ib.*
11. A person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road is not entitled to payment out of the earnings of the road, or the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers. *Davenport v. The Receivers of the Alabama & Chattanooga Railroad Co.,* 519
12. When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him. *Young v. The Montgomery & Eufaula Railroad Co.,* 606
13. Where junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun, until the first is ended. *Ib.*

14. The court will not appoint a receiver of property which is in the possession of a person not a party to the suit. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Co.* 621

RECEIVERS' CERTIFICATES.

See RECEIVERS, 6, 7, 8, 9.

RECORDS.

The code of Georgia and the practice of the courts of the state require the proceedings and judgments of the courts to be entered upon the minutes, which are the authentic record of what is done by the courts. *Plant v. Gunn*, 372

RECTIFIER.

See STATUTES CONSTRUED, 4, 5.

REINSCRIPTION.

See INSCRIPTION, 1, 2.

REMOVAL OF CAUSES.

1. Receivers of National Banking Associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from state courts to the United States courts. *Bird's Executors v. Cockrem, Receiver*, 32
2. The trial before which application must be made for the removal of a case from the state to the federal court, in order to warrant such removal under section 3 of the act of March 3, 1875 (18 Stat., 470), is such a trial upon either the law or facts of the case, or both, as settles and concludes the controversy between the parties. *Lewis v. Smythe*, 117
3. When such a trial has been commenced, though not concluded, the application for removal comes too late. *Ib.*
4. In a case which can be removed from the state to a federal court under the acts of congress of March 3, 1875, the timely presentation of the petition and bond for removal is effectual to suspend all the powers of the state court in which the suit is pending. *Ellerman v. The New Orleans, Mobile & Texas Railroad Co.*, 120
5. An appeal does not lie to an order of a state court for the removal of a cause to a federal court, and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal. *Ib.*
6. The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with the plaintiffs, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue. *Ib.*
7. Where a citizen of one state filed a petition in a court of the state of which he was a citizen, against a citizen of another state, to restrain the execution of a judgment obtained in the state court by the latter against the former,

such cause was removable to the federal court under the act of March 3, 1875, notwithstanding the fact, that the federal courts were prohibited by section 720, revised statutes, from granting an injunction to stay proceedings in a state court. *Watson v. Bondurant*, 166

8. The fact, that by reason of local prejudice against his race and color, a person of African descent cannot have a fair trial in the state courts, is not a ground under the civil rights act for removing a criminal prosecution against such person, from the state to the federal court. *The State of Texas v. Gaines*, 342

RENT.

See BANKRUPTCY, 9, 10, 11, 37, 38, 41, 42, 43, 44, 45. POSSESSOR.

RES JUDICATA.

1. A creditor of a succession claimed title to a part of the proceeds of a life insurance policy, on the ground that the policy had been pledged to him to secure a debt due him from the testator, but his claim was rejected by the court, on the ground that there had been no delivery of the pledge: *Held*, that this decision was no bar to a bill in equity to enforce a specific performance of the contract to deliver the pledge and for a decree for so much of the proceeds of the policy as might be necessary to pay the complainants claim. *Myers & Leary v. Executor of D' Meza*. 160
2. A creditor's bill which sought to follow as trust money, funds of a bank invested by its officers in a railroad company, was dismissed, on the ground among others that the identity of the property purchased with the money of the bank could not be ascertained: *Held*, that such decree was a bar to a new bill brought for the same purpose, and substantially the same as the first except that it contained an averment which was not in the first bill, to the effect that the complainant had reduced to judgment his claim against the officers of the bank for the misappropriated funds. *Case, Receiver v. The New Orleans & Carrollton Railroad Co.* 235
3. By a law of Texas, a judgment against the plaintiff in an action of trespass to try title is conclusive, unless he commences a second action within a year: *Held*, that the institution of a suit within the year by the original defendant, against the grantees of the original plaintiff for the same property, relieved the latter from the necessity of commencing suit within the year. They could defend their title in this second suit, and the claim of *res judicata* by the plaintiff in the second suit would not hold. *The City of Brownsville v. Carrasco*. 293
4. Where, in an action of trespass to try title, the grantees of the plaintiff, who had lost his suit, neglect to bring a second action within the year, but the defendant in the first action sues the grantees of the plaintiff in that action for the same property, within a year after the determination of the first suit, and said grantees file a plea in the second action in the nature of a reconvention, claiming title to the property in dispute, and demanding damages for trespass thereto committed by the plaintiff: *Held*, that the plea was equivalent to a new action, and the said grantees were not concluded by the judgment in the first action. *Ib.*
5. A resolution of the congress of the state of Tamaulipas, passed on October 20, 1848, after the lands in dispute had become a part of the territory of the state of Texas, is not binding as *res judicata* upon the parties in this case; but as an authority on the law of Tamaulipas, bearing on the construction of the decree of October 15, 1827, it is of the highest value. *Ib.*

REVIEW — BILL OF.

A bill of review can only be sustained upon the ground of error apparent on the record, and the record consists of the pleadings, proceedings and decree, and does not include the evidence. *Barker's Heirs v. Barker's Assignee.* 241

SALE.

1. The code of Louisiana required that before property could be seized and sold on an order of seizure and sale, the judgment debtor should be served with notice thereof. The defendant was expelled by the United States military authorities, from the city of New Orleans, and carried within the confederate lines. During his enforced absence, his property in New Orleans was seized and sold by the sheriff, notice of the seizure and sale being served upon a *curator ad hoc* appointed by the court. *Held*, that the sale was void. *Kimball v. Taylor.* 87
2. Where a judgment was a lien on the real estate of the judgment debtor, and an execution had been levied thereon, and the property advertised for sale, but before sale the judgment debtor was adjudicated a bankrupt, the sheriff, unless restrained by the bankrupt court, might well proceed to sell, and his sale would be valid. *Thames v. Miller, Assignee.* 564
3. When several execution creditors, for the purpose of preventing a sacrifice of the property of their debtor, enter into an agreement to bid off the property and under this agreement it is bid off for its full value, the sale will not be set aside on account of such agreement. *Id.*

SALVAGE.

1. The 19th admiralty rule was intended to prohibit a joinder of proceedings *in rem* and *in personam* in the same libel for the salvage of the same goods. *Nott v The Sabine and cargo.* 211.
2. The extinguishment of a fire in a ship lying at the wharf of a city, by its fire department, does not entitle the firemen to salvage, even though there is no city ordinance requiring them to extinguish fires. *Davey v. The Mary Frost and cargo.* 306

SEAL.

See CITATION.

SETOFF.

Where a debtor had notice that his creditor A. had assigned the debt due him to B. and afterwards procured a counterclaim against the original creditor A., *held*, that he could not use such claim as a setoff in a suit brought in the name of A. for the use of B., to recover the debt assigned to B. *Whitaker v. Pope,* 463

STAGING.

See PATENTS, 2.

STATE COURTS.

1. Where a question decided by a state supreme court is one of general jurisprudence, not depending upon any special statutory law of the state, the United States courts sitting in the state are, as courts of coördinate jurisdiction with the state court, not absolutely bound by such decision, but will give it such weight as the respect due the learned court which made the decision would properly require. *Branch v. The Macon & Brunswick Railroad Company.* 385
2. The federal courts are not bound to follow the construction put upon a state statute by an inferior state court. *The Patapasco Guano Company v. Morrison, Trustee.* 395
3. A judgment rendered in a circuit court of the United States cannot be attached by process issued against the plaintiff in the judgment out of a state court. *Thomas & Willis v. Wooldridge,* 667

STATUTES CONSTRUED.

See HABEAS CORPUS, 2. LIMITATIONS, 2. REMOVAL OF CAUSES, 4.

1. The word "insolvency," as used in the fifty-second section of the currency act (13 Stat., 115; Rev. Stat., sec. 5242) is synonymous with the same word as used in the bankrupt act. *Case, Receiver, v. Citizens Bank,* 23
2. To make transfers, assignments, deposits and payments, void under said section, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they were made. *Ib.*
3. Property cannot be considered "abandoned," in the sense in which the word is used in the act of congress (13 Stat., 375, sec. 1), unless the owner was voluntarily absent, and engaged either in arms or otherwise in aiding or encouraging the rebellion. *Kimball v. Taylor,* 37
4. The spirits forfeited by sec. 96 of the act of July 20, 1868 (Rev. Stats., sec. 3456), as a penalty for the offenses therein mentioned, are the spirits owned by the distiller, rectifier or wholesale liquor dealer, or on which he has any interest as owner at the time of the discovery of his offense. *The United States v. Two Hundred Barrels of Whisky,* 54
5. The failure of a rectifier to cause spirits to be gauged and stamped, as required by the 25th section of the act of July 20, 1868 (Rev. Stats., sec. 3320), is punishable by the 57th section, not by the 96th section of this act (Rev. Stats., sec. 3456). *Ib.*
6. Section 3651 of the revised statutes of Louisiana of 1870 was intended to apply only in cases where the carelessness of the officers of a boat is so gross as to justify a criminal prosecution; in other words, to cases of misconduct. *Levi v. The New Orleans Insurance Association,* 63
7. The preference of one creditor to another by a national bank, mentioned in sec. 5242, Rev. Stats., is a preference given to the creditor to secure or pay a preëxisting debt. *Casey, Receiver, v. La Société de Crédit Mobilier.* 77
8. When a national bank, being embarrassed and in need of assistance, receives a loan of money or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, this is not giving him a preference over other creditors, within the meaning of sec. 5242, Rev. Stats. *Ib.*
9. The legislature of Louisiana has left it in doubt whether indorsement as well as delivery is essential to the pledge of a negotiable instrument. *Ib.*

10. The Code of Louisiana gives no effect to an unregistered act of alienation as against *bona fide* purchasers or creditors. *Barker v. Barker's Assignee*, 87
11. The trial before which application must be made for the removal of a case from the state to the federal court, in order to warrant such removal under section 3 of the act of March 3, 1875 (18 Stat., 470), is such a trial upon either the law or facts of the case, or both, as settles and concludes the controversy between the parties. *Lewis v. Smythe*, 117
12. When such a trial has been commenced, though not concluded, the application for removal comes too late. *Ib.*
13. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property. *Ellerman v. The New Orleans, Mobile & Texas Railroad Company*, 120
14. Shares of stock in an incorporated company, held and claimed by a nonresident of the district within which the company has its domicile, cannot be considered "personal property within the district," so as to authorize the court in a suit in which plaintiff sets up title to the stock, to order the holder to be constructively served in the manner provided by sec. 738, Rev. Stat. *Kilgour v. The New Orleans Gas Light Company*, 144
15. Section 5440 of the Rev. Stat. of the United States, which makes it a misdemeanor to "conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose," etc., forms a part of the revenue laws of the United States. *The United States v. Fehrenback*, 175
16. The limitation for prosecutions under said section is declared by section 1046, Rev. Stat., and is five years. *Ib.*
17. Where a male sixty-eight years of age, and a female forty-four years of age, respectively entitled to inherit from one another, perish in the same event, the presumption raised by article 939 of the civil code of Louisiana, in the absence of circumstances of the fact is, that the male perished first. *Robinson v. Gallier*, 178
18. Although the provisions of section 820 of the U. S. Rev. Stats. were not in force on the first day of December, 1873, and that section seems to have been included in the revision by mistake, it has nevertheless been reenacted by congress, and is a part of the law of the land. *The United States v. Hammond*, 197
19. Section 820 of the U. S. Rev. Stats. prescribes an absolute disqualification for the causes therein mentioned of grand and petit jurors, and it does not rest in the discretion of the court or with the United States attorney to decide whether the rule of disqualification shall be applied or not. *Ib.*
20. A small pleasure boat twenty-nine feet long and seven feet wide, without deck propelled by a small steam engine with a cylinder of nine inches stroke and three and one-half inches diameter, run occasionally by its owners for amusement upon Buffalo Bayou below Houston, Texas, is not a vessel navigating the public waters of the United States within the meaning of the steamboat inspection laws. *The United States v. The Steamer Mollie*, 318
21. The fact, that by reason of local prejudice against his race and color, a person of African descent cannot have a fair trial in the state courts, is not a ground under the civil rights act for removing a criminal prosecution against such person, from the state to the federal court. *The State of Texas v. Gaines*, 342
22. The act of the legislature of Texas, of February 2, 1860, which gave a right of action for damages to the surviving husband, wife, child, children, or parents of any person whose life was lost by the negligence or carelessness of the proprietors, etc., of any railroad, steamboat, etc., entitled the plaintiff to recover compensatory damages only. *Gohen v. The Texas Pacific Railroad Company*, 346

23. In an action on the case to recover the forfeit provided for in section 4 of the act of May 31, 1870 (16 Stat. 141), the declaration must aver that the plaintiff was prevented from voting, by force, bribery, threats, intimidation, or other such unlawful means. *Seeley v. Koor*, 968
24. A declaration which alleges that the unlawful means by which the plaintiff was prevented from voting was the erroneous decision of the defendant, who was an officer of the election, upon a question of law, without averring that the decision was willfully or maliciously wrong, is insufficient. *Ib.*
25. Section 6 of the "Act to further the administration of justice" (17 Stat., 197; Rev. Stat., sec. 915) does not confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment. *Chittenden & Co. v. Darden & Holston*, 457
26. A statute of Alabama declared that no foreign insurance company should do business in that state, unless it filed an agreement that service of process upon its agent in the state should be taken and held as service upon the company: *Held*, that process from the United States courts for the districts of Alabama fell within the terms of the statute and agreement. *Knott v. The Southern Life Insurance Company*, 479
27. The law of Alabama (Rev. Code, sec. 2878) does not give the landlord a lien for rent upon goods and chattels of a tenant found upon the premises, held by lease for one or more years; but as between an execution creditor and the landlord, simply declares that the latter shall be entitled to priority of payment out of the proceeds of the goods, to the extent of one year's rent. *Bailey, Assignee, v. Loeb & Brother*, 578
28. Effect of proceedings under the Florida internal improvement act of January 6, 1855. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Company*, 621
29. A justice of the supreme court, prior to the "act to further the administration of justice," of June 1, 1872 (Rev. Stat., sec. 719), could grant an injunction at any place, in or out of the circuit in which the suit was instituted. *Ib.*
30. By the seventh section of that act, it is provided that no justice of the supreme court shall grant injunctions except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge. *Ib.*
31. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute as well as when they cannot hear it for any other cause; and the supreme court justice may hear the application at any place where he may be. *Ib.*
32. A construction of a law which would impute to the legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided, if it can be fairly and reasonably done. *Milner's Administrator v. The City of Pensacola*, 652
33. This rule applied to the acts of the legislature of Florida providing for the incorporation of cities and towns approved August 6, 1868, and February 4, 1869. *Ib.*
34. The section of an act of a state legislature which purported to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the state, is in conflict with the act of congress approved July 22, 1866, entitled "an act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes;" and the section conferring such exclusive right is therefore null and void. *The Pensacola Telegraph Company v. The Western Union Telegraph Company*, 643
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2. Such a corporation is a person; its property is not the property of its stockholders, nor are its rights their rights. *Ib.*
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6. But where the officers and managers of a company, by fraud and collusion with third persons, are sacrificing, or are about to betray or sacrifice the interests of the corporation, a stockholder may, for such breach of trust and conspiracy, call the guilty parties to an account in a court of equity. *Ib.*

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trust, notwithstanding a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole property. *Ib.*

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1. Where two persons perish in the same event, there are no presumptions of law as to survivorship unless prescribed by positive enactment. *Robinson v. Gallier,* 178
2. The presumptions of law as to survivorship prescribed by the civil code of Louisiana, where two persons perish in the same event, only apply in the absence of circumstances of the fact, and where the persons are respectively entitled to inherit from one another. *Ib.*
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4. Where the title of the plaintiff who seeks to disturb the possession of others depends upon the fact that the person under whom he claims survived another, though both perished in the same event, and the case admits of no presumptions of law, the burden of proof is on the plaintiff to establish the fact of survivorship. If it appear that both persons perished at the same instant, or if it shall be impossible to declare from the evidence which perished first, the plaintiff must fail. *Ib.*
5. But the fact of such survivorship does not require any higher degree of proof than other facts in a civil case. *Ib.*

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2. The validity of said decree could not be called in question, it being the act of the highest tribunal known to the laws of Tamaulipas, invested with supreme judicial as well as legislative authority, and the lands affected by it being at the time within the territory of that state. *Ib.*
3. A resolution of the congress of the state of Tamaulipas, passed on October 20, 1848, after the lands in dispute had become a part of the territory of the state of Texas, is not binding as *res judicata* upon the parties in this case; but as an authority on the law of Tamaulipas, bearing on the construction of the decree of October 15, 1827, it is of the highest value. *Ib.*

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1. Where a trustee and executor, in entire disregard of the directions of the will, takes funds of the estate and treats himself as the borrower, he must be charged with the highest amount of interest allowed by the law. He is personally and absolutely responsible for the fund. *McKenzie v. Anderson, Ex'r*, 357
2. Mode of adjustment of accounts of executor and trustee, in case of maladministration. *Ib.*
3. For such public and national calamities as war, foreign or civil, and the vicissitudes of fortune which attend them, no individual who does not incite them is responsible. *Ib.*
4. An executor is not responsible for the loss of the funds received by him for dividends in confederate money or notes, which, at the time, he was obliged to accept. *Ib.*
5. A trustee, unless expressly authorized, cannot issue negotiable paper, executed in his trust character, so as to bind the trust estate. *The Patapasco Guano Co. v. Morrison, Trustee*, 395

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8. A trustee having received the trust funds in good money, and loaned them out, afterwards received in payment of the loan, at par, confederate treasury notes, which were worth only thirty cents on the dollar, and which afterwards became worthless in his hands. *Held*, that he was not entitled to a credit for the amount unless he could show that he received the depreciated paper upon actual compulsion. *Ib.*

TRUSTS.

See MUNICIPAL CORPORATIONS, 6. TRUSTEE, 1, 2, 3, 4, 5.

1. Where, by the laws of a state, aliens are prohibited from acquiring and holding real property, a deed made by A. to B. upon a secret trust for C., who is a foreigner, A. having no knowledge of the trust, is not void; the trust only is void. *Hammekin v. Clayton*, 336
2. An attorney for trustees charged with a public trust, or one of such trustees acting as attorney for the others, has not the implied power to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. *Vose v. The Trustees of the Internal Improvement Fund of Florida*, 647
3. Lands belonging to the public domain of a state, which, by an act of the legislature had been made a trust estate for the payment of certain bonds and placed under the control of trustees appointed by law, were subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court could appoint its own agents to make sales thereof. *Ib.*
4. In such a case, the court has the power to compel the trustees who hold the legal title to execute conveyances for the lands sold by the agents of the court. *Ib.*
5. When either the money or any other assets of one person are used by another to purchase property in his own name, a resulting trust arises in favor of the party with whose means the purchase is made. *Friedlander & Gerson v. Johnson and wife*, 675

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1. A vessel is unseaworthy that is not manned by the necessary officers and crew, but no recovery can be had against her on that account for a loss that was not attributable to such deficiency. *The Planter*, 490
2. The fact that a vessel, without having encountered any tempestuous weather, suddenly springs aleak within twenty hours after leaving port, so that her officers are compelled, in order to save her from sinking, to throw overboard more than one-third her cargo, raises the presumption that she was unseaworthy when she commenced her voyage. *Ib.*

UNSKILLFULNESS.

See NEGLIGENCE, 1.

USURY.

See ACTION AT LAW, 2. INTEREST, 5.

VOLUNTARY APPEARANCE.

The giving of a bond by a nonresident defendant for the release of property seized by process of foreign attachment, issued from a United States court, is not a voluntary appearance, and does not give the court jurisdiction.
Chittenden & Co. v. Darden & Holston, 437

VOLUNTARY CONVERANCE.

See FRAUDULENT CONVEYANCE, 1, 2.

WHOLESALE LIQUOR DEALER.

See STATUTES CONSTRUED, 4.

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23. In an action on the case to recover the forfeit provided for in section 4 of the act of May 31, 1870 (16 Stat. 141), the declaration must aver that the plaintiff was prevented from voting, by force, bribery, threats, intimidation, or other such unlawful means. *Seeley v. Koox*, 368
24. A declaration which alleges that the unlawful means by which the plaintiff was prevented from voting was the erroneous decision of the defendant, who was an officer of the election, upon a question of law, without averring that the decision was willfully or maliciously wrong, is insufficient. *Ib.*
25. Section 6 of the "Act to further the administration of justice" (17 Stat., 197; Rev. Stat., sec. 915) does not confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment. *Chittenden & Co. v. Darden & Holston*, 437
26. A statute of Alabama declared that no foreign insurance company should do business in that state, unless it filed an agreement that service of process upon its agent in the state should be taken and held as service upon the company: *Held*, that process from the United States courts for the districts of Alabama fell within the terms of the statute and agreement. *Knott v. The Southern Life Insurance Company*, 479
27. The law of Alabama (Rev. Code, sec. 2878) does not give the landlord a lien for rent upon goods and chattels of a tenant found upon the premises, held by lease for one or more years; but as between an execution creditor and the landlord, simply declares that the latter shall be entitled to priority of payment out of the proceeds of the goods, to the extent of one year's rent. *Bailey, Assignee, v. Loeb & Brother*, 578
28. Effect of proceedings under the Florida internal improvement act of January 6, 1855. *Searles v. The Jacksonville, Pensacola & Mobile Railroad Company*, 621
29. A justice of the supreme court, prior to the "act to further the administration of justice," of June 1, 1872 (Rev. Stat., sec. 719), could grant an injunction at any place, in or out of the circuit in which the suit was instituted. *Ib.*
30. By the seventh section of that act, it is provided that no justice of the supreme court shall grant injunctions except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge. *Ib.*
31. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute as well as when they cannot hear it for any other cause; and the supreme court justice may hear the application at any place where he may be. *Ib.*
32. A construction of a law which would impute to the legislature a design to perpetrate an unconscionable and barefaced fraud ought to be avoided, if it can be fairly and reasonably done. *Milner's Administrator v. The City of Pensacola*, 632
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